LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. [illegible] 50

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, PETITIONER,

vs.

LUCAS FLOUR COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1961
CERTIORARI GRANTED APRIL 3, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 716

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, PETITIONER,

vs.

LUCAS FLOUR COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

	Original	Print
Record from the Superior Court of the State of Washington in and for the County of King		
Complaint	A	1
Temporary injunction	E	3
Second amended complaint	G	4
Order on motions	O	9
Defendants' answer to plaintiff's second amended complaint	R	11
Plaintiff's reply	X	16
Statement of facts	3	19
Appearances	3	19
Defendant's motion to dismiss as to certain parties and granting thereof	4	20
Opening statement on behalf of plaintiff by Mr. Oles	5	21
Partial opening statement on behalf of defendant by Mr. Hoague	14	27
Colloquy between court and counsel	15	27

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 28, 1961

	Original	Print
Record from the Superior Court of the State of Washington in and for the County of King —Continued		
Testimony of Nick Lucas—		
direct	19	30
Colloquy between court and counsel	23	33
Testimony of Nick Lucas—		
direct	27	36
Offers in evidence	28	37
Testimony of Nick Lucas—		
direct	30	38
cross	55	57
redirect	62	63
Deposition of Dale Moorhead read into record—		
direct	64	64
cross	68	68
redirect	69	68
Deposition of Richard F. Baker read into record—		
direct	70	69
cross	79	76
Offers in evidence	81	77
Testimony of John Lucas—		
direct	81	77
cross	84	79
Peter Conom—		
direct	86	81
Offers in evidence	88	82
Voir dire examination of Peter Conom—		
(by Mr. Hoague)	97	90
Testimony of Peter Conom—		
direct	99	91
cross	109	99
Offers in evidence	111	100
Plaintiff rests	112	101
Further opening statement on behalf of defendant by Mr. Hoague	112	101
Statement of objection made by Mr. Oles	114	102
Testimony of Floyd Anderson—		
direct	116	104

	Original	Print
Record from the Superior Court of the State of Washington in and for the County of King —Continued		
Colloquy between court and counsel	116	104
Testimony of Floyd Anderson—		
direct	127	111
Offer in evidence, objections thereto and overruling thereof	128	113
Testimony of Floyd Anderson—		
direct	132	115
Offer in evidence	140	121
Testimony of Floyd Anderson—		
direct	140	121
cross	146	126
redirect	153	131
Melvin T. Welsch—		
direct	157	134
cross	168	142
Offer in evidence	171	145
Testimony of Nick Matula—		
direct	173	147
cross	178	150
Defendant rests	182	153
Testimony of Nick Lucas—		
(recalled—direct (rebuttal))	182	153
Floyd Anderson—		
(recalled—direct (surrebuttal))	185	155
Memorandum decision, Royal, J., April 9, 1959	188	157
Clerk's certificate	207	171
Memorandum decision relative to defendants' motion for dismissal and proposed findings of fact, July 13, 1959	208	172
Motion for dismissal notwithstanding court's memorandum decision	212	175
Defendant's proposed findings of fact and conclusions of law	213	176
Findings of fact and conclusions of law	221	184
Judgment	228	190
Order denying motion for dismissal notwithstanding memorandum decision	230	191

	Original	Print
Proceedings in the Supreme Court of the State of Washington	231	192
Opinion, Hunter, J.	231	192
Judgment	239	200
Clerk's certificate (omitted in printing)	240	201
Exhibits filed in the Superior Court of the State of Washington in and for the County of King	241	202
Plaintiff's Exhibit 1—Private Carrier Agreement effective April 1, 1955	241	202
Plaintiff's Exhibit 11—Record of Arbitration	246	209
Plaintiff's Exhibit 12—Award of Arbitration—Opinion	248	211
Defendant's Exhibit 13—Memo from Nick Lucas (signed) Pete to Jack, dated May 23, 1958	257	219
Order allowing certiorari	258	219

[fol. A] [File endorsement omitted]

IN THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

No. 521982

LUCAS FLOUR COMPANY, a Washington corporation,
Plaintiff,

vs.

NUGENT LAPOMA; JOHN DOE I; JOHN DOE II; JOHN DOE III; LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, Defendants.

COMPLAINT—Filed May 27, 1958

Comes now plaintiff and for cause of action complains and alleges as follows:

I.

Plaintiff is and at all times relevant hereto was a corporation of the State of Washington, engaged in the wholesale distribution of flour, with its principal place of business located in Seattle, Washington. Plaintiff has paid all license fees and taxes due the State of Washington.

II.

Defendant Local 174, Teamsters, Chauffeurs & Helpers of America, hereinafter called Local 174, is and at all times relevant hereto was an unincorporated association and a labor union with its principal offices located in Seattle, King County, Washington. The members of Local 174 are drivers and helpers residing in King County, Washington. Individual defendants and each of them are officers and agents of Local 174, defendant Nugent LaPoma as acting or purported Secretary-Treasurer, and the other de-

[fol. B] fendants, whose true names are unknown to plaintiff, as pickets or otherwise representing said Local 174. Plaintiff asks leave to substitute the true names of John Doe I, John Doe II and John Doe III when the same are known to plaintiff.

III.

Plaintiff employs in King County, State of Washington certain individuals who are members of Local 174 but has no dispute with any of said employees. Commencing in the morning of May 27, 1958 defendant John Doe I began picketing plaintiff's place of business in Seattle, Washington, acting for and on behalf of defendant Local 174 at the express request and instructions of defendant Nugent LaPoma. Defendant John Doe I has verbally advised officers of plaintiff on said date that the purpose of said picketing is to require plaintiff to employ Melvin T. Welsch, formerly but not presently employed by plaintiff. Said Melvin T. Welsch was discharged by plaintiff before May 27, 1958 for the reason that his work was not satisfactory.

IV.

As a result of aforesaid picketing plaintiff is unable to continue the operation of its business, is unable to make or receive deliveries of its products, and is suffering loss of good will and other damages. Plaintiff asks leave to amend this Complaint by setting forth and praying for all such damages as may accrue as a result of the acts of defendants.

V.

Aforesaid picketing is illegal and solely intended to coerce plaintiff. Plaintiff has no contract or other agree-
[fol. C] ment with defendants or any of them requiring plaintiff to employ any particular number of employees or to accept as employees persons selected by the defendants or any of them. By agreement with defendant Local 174 effective April 1, 1955 plaintiff has the express right to discharge employees whose work is not satisfactory. Unless enjoined defendants will irreparably harm

plaintiff's business and there is no adequate remedy at law available to plaintiff.

Wherefore, plaintiff prays: That the Court issue an order herein directing the defendants and each of them to appear at a time and place certain then and there to show cause, if any there be, why defendants and each of them should not be enjoined *pendente lite* from picketing, causing to picket, or otherwise interfering with plaintiff's business or places of business; that upon return of said order to show cause, an injunction *pendente lite* be issued as herein prayed for; and that upon the trial of this cause the Court issue a permanent injunction herein and award plaintiff such damages and other and further relief as may be meet and proper, together with plaintiff's costs to be taxed herein in accordance with law.

Allen, DeGarmo & Leedy, Attorneys for Plaintiff.

Office and Post Office Address: 1308-20 Northern Life Tower, Seattle 1, Washington.

[fol. D] *Duly sworn to by Nick Lucas, jurat omitted in printing.*

[fol. E] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 521982

[Title omitted]

TEMPORARY INJUNCTION—June 4, 1958

This Cause came on before the undersigned Judge of the above-entitled Court on June 2 and 3, 1958 on return of an Order to Show Cause issued herein on May 28, 1958. The parties appeared by and through their attorneys of record. The Court considered the files and records herein, and there being good cause shown, now, therefore

It Is Ordered, Adjudged and Decreed that defendants and each of them be and the same hereby are enjoined *pendente lite* from picketing, causing to picket, or otherwise interfering with plaintiff's business or places of business, provided this injunction as to picketing or causing to picket plaintiff's place of business may on defendants' application be dissolved, after notice and hearing, on a showing that defendants have sought arbitration under the contract, Exhibit 1 herein, and that plaintiff has not agreed in good faith to arbitrate. If good faith arbitration fails to solve the labor difficulty with (sic) two weeks the injunction may also be dissolved.

Done in Open Court this 4th day of June, 1958.

F. A. Walterskirchen

Presented by Allen, DeGarmo & Leedy, By Stuart G. Oles, 1308-18 Northern Life Tower, Seattle, Washington.

[fol. G] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 521982

[Title omitted]

SECOND AMENDED COMPLAINT—Filed December 9, 1958

Comes now plaintiff and for cause of action complains and alleges as follows:

I.

Plaintiff is and at all times relevant hereto was a corporation of the State of Washington, engaged in the wholesale distribution of flour, with its principal place of business located in Seattle, Washington. Plaintiff has paid all license fees and taxes due the State of Washington.

II.

Defendant Local 174, Teamsters, Chauffeurs & Helpers of America, hereinafter called Local 174, is and at all times relevant hereto was an unincorporated association and a labor union with its principal offices located in Seattle, King County, Washington. The members of Local 174 are drivers and helpers residing in King County, Washington. Individual defendants and each of them are officers and agents of Local 174, defendant Nugen[illegible]aPoma as acting or purported Secretary-Treasurer and principal [fol. H] executive officer thereof, and the other defendants, whose true names are unknown to plaintiff, as pickets or otherwise representing said Local 174. Plaintiff asks leave to substitute the true names of John Doe I, John Doe II and John Doe III when the same are known to plaintiff.

III.

Plaintiff employs, and at all times relevant hereto has employed, in King County, State of Washington, certain individuals who are or were during their employment members of Local 174. Other than as hereinafter alleged, plaintiff has never had any dispute with any of said individuals. The terms of employment of said individuals are, and at all times relevant hereto were, prescribed by an agreement between plaintiff and Local 174, which agreement was effective from and after April 1, 1955 and during all times pertinent hereto. A subsequent agreement was entered into between said parties prior to the date of this Second Amended Complaint, which subsequent agreement however is identical to the agreement effective April 1, 1955 for all purposes pertinent to this action. Each party to this action has a copy of said agreement, which contains, among others, the following provisions:

"ARTICLE II

The Employer reserves the right to discharge any man in his employ if his work is not satisfactory.

[fol. I] ARTICLE XIV

Should any difference as to the true interpretation of this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said members cannot agree, a third member, who must be a disinterested party shall be selected, and the decision of the said Board of Arbitration shall be binding. It is further agreed by both parties hereto that during such arbitration, there shall be no suspension of work.

Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding.

If any employee is removed from service for any doubtful cause, he shall have a fair and impartial investigation within three days. If found guilty, he shall suffer the penalty, and if not, he shall be paid for his time off at the regular scale of wages."

IV.

Commencing in the morning of May 27, 1958 defendants John Doe I and John Doe II began picketing plaintiff's place of business in King County, Washington, acting for and on behalf of, and at the express request and instructions of, Local 174. The purpose of such picketing was to compel plaintiff to re-employ one Melvin T. Welsch, who had been an employee of plaintiff. Said Melvin T. Welsch was discharged by plaintiff on or before May 27, 1958 for the reason that his work was not satisfactory. Thereafter, and on or about June 4, 1958, plaintiff sought and obtained herein an order temporarily enjoining aforesaid picketing, which order is on file in the above-entitled Court and cause and by this reference is incorporated herein.

[fol. J] V.

As a result of aforesaid picketing commencing May 27, 1958 and terminating after June 4, 1958, on which latter date said picketing ceased pursuant to aforesaid temporary injunction issued in this Court and cause, plaintiff has suffered damages as follows:

Railroad Demurrage	$ 140.00
Wages	910.00
Overtime	81.20
Truck Rentals	50.00
Operating Expenses	2,500.00
Loss of Profit	1,100.00
Total	$4,781.20

VI.

Aforesaid picketing was illegal and solely intended to coerce plaintiff. Plaintiff has no contract or other agreement with defendants or any of them requiring plaintiff to employ any particular number of employees or to accept as employees persons selected by the defendants or any of them. Unless enjoined permanently, defendants will irreparably harm plaintiff's business; there is no adequate remedy at law available to plaintiff.

VII.

Pursuant to order of this Court entered June 4, 1958, the plaintiff and defendant Local 174 proceeded to arbitrate the issues in this cause in accordance with the aforementioned labor agreement between them, and Walter Briem and Hugh E. Pickel were duly nominated as arbitrators. Said arbitrators having disagreed, plaintiff and Local 174 entered into an agreement for continued arbitra-
[fol. K] tion, and for that purpose a third and impartial arbitrator was selected, to-wit, Harry Margolis. The scope and character of said agreed arbitration was defined in a Record of Arbitration executed by the parties and the arbitrators on September 11, 1958. A copy of

said Record of Arbitration is marked Exhibit A, attached hereto, and by this reference incorporated herein.

VIII.

On and after September 11, 1958, the aforesaid arbitrators conducted hearings; and the plaintiff and Local 174 appeared before said arbitrators by their attorneys of record herein and presented evidence, testimony and argument on the issues posed by aforesaid Record of Arbitration. Thereafter, and on November 7, 1958, a majority of aforesaid arbitrators, comprised of Hugh E. Pickel and Harry Margolis, signed an Award of Arbitrators, the original of which has been filed herein; said Award of Arbitrators is by this reference incorporated herein. Plaintiff expressly adopts the Findings of Fact, Conclusions of Law and Award as part of the allegations of this Second Amended Complaint. The decision consisting of said Findings, Conclusions and Award, is final and binding upon plaintiff and upon Local 174 as to all questions of fact and law therein decided, pursuant to the express provisions of the agreement referred to in paragraph III of this Second Amended Complaint, and also pursuant to the provisions of Exhibit A, attached hereto.

[fol. L] IX.

The fair and reasonable cost to plaintiff of aforesaid arbitration, not including attorneys' fees, was as follows:

Harry Margolis (½ of fee)	$ 300.00
Hugh E. Pickel	677.50
Merritt Dyer, Court Reporter (½ of charges)	178.88
	$1,156.38

Wherefore, plaintiff prays:

1. That the Court make permanent the temporary injunction of June 4, 1958.

2. That the Court award plaintiff judgment against defendant Local 174 in the sum of $4,781.20 together with interest at 6% from and after June 4, 1958 until paid.

3. That the Court award plaintiff judgment against defendant Local 174 in the sum of $1,156.38 together with interest at 6% from and after November 7, 1958 until paid.

4. That the Court award plaintiff its costs to be taxed herein against defendant Local 174 in accordance with law, and such other and further relief as may be just and equitable.

Allen, DeGarmo & Leedy, Attorneys for Plaintiff.

Office and Post Office Address: 1308-20 Northern Life Tower, Seattle 1, Washington.

[fol. M] *Duly sworn to by Nick Lucas, jurat omitted in printing.*

[fol. O] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 521982

[Title omitted]

ORDER ON MOTIONS—January 12, 1959

This Matter came on before the undersigned Judge of the above entitled Court upon the motion of defendants to strike summons and second amended complaint, the alternative motion of defendant to strike portions of second amended complaint, and the motion of plaintiff for leave to amend. The parties having agreed to the entry of this order, and the Court, having considered the files and records herein and being fully advised in the premises, now, therefore,

It Is Ordered that the motion of defendants to strike summons and second amended complaint be and the same hereby is denied, and

Be It Further Ordered that the motion of plaintiff for leave to amend be and the same hereby is granted, and

[fol. P] Be It Further Ordered that plaintiff serve and file herein on or before January 15, 1959 a bill of particulars setting forth the nature and character of damages sought in paragraph V of the second amended complaint, and

Be It Further Ordered that the words "illegal and" in paragraph VI of the second amended complaint be and the same hereby are stricken, and

Be It Further Ordered that the last sentence of paragraph VIII of the second amended complaint be and the same hereby is stricken, and

Be It Further Ordered that paragraph IX of the second amended complaint be and the same hereby is stricken, and

Be It Further Ordered that paragraph 3 of the prayer of the second amended complaint be and the same hereby is stricken, and

Be It Further Ordered that the rulings herein contained shall be without prejudice to such claims as plaintiff may have for costs in the event it prevails in this action, and

Be It Further Ordered that defendants shall have until January 22, 1959 to serve and file herein their answer to the second amended complaint, and

[fol. Q] Be It Further Ordered that the cause of action against the defendant Nugent LaPoma herein be and the same hereby is dismissed on the ground that the second amended complaint fails to state a cause of action against said defendant.

Done in Open Court this 12th day of January, 1959.

Donald L. Gaines, Judge.

Presented by Allen, DeGarmo & Leedy, By Stuart G. Oles, 1308-18 Northern Life Tower, Seattle, Washington.

Approved for Entry: MacDonald, Hoague & Bayless, Attorneys for Local 174, Teamsters, Chauffeurs & Helpers of America.

[fol. R] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

No. 521982

[Title omitted]

DEFENDANTS' ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT—Filed January 28, 1959

Come now the defendants above named and for answer to the Second Amended Complaint of plaintiff filed herein, admit, deny and allege as follows:

I

Defendants have no information as to the facts alleged in paragraph I of the Second Amended Complaint, and therefore deny the same.

II

Defendants admit that Local 174, Teamsters, Chauffeurs & Helpers of America, hereinafter called "Local 174," is and at all times relevant to the above-entitled action was an unincorporated association and a labor union with its principal offices located in Seattle, King County, Washington; that Nugent LaPoma, who is no longer a defendant in this action, is and was the Secretary-Treasurer of Local 174, but otherwise deny the allegations in paragraph II of the Second Amended Complaint.

III

Defendants deny that plaintiff has never had any dispute with any of its employees and specifically allege that on May 27, 1958, it had a dispute with one Melvin T. Welsch, who was at the time of such dispute an employee of the plaintiff. Defendants admit the contract described in paragraph III of the Second Amended Complaint and [fol. S] allege that said contract also contained the following provisions:

"ARTICLE VI

Seniority shall prevail in layoffs for all employees after three (3) months' service. In the event of a layoff, the last employee hired shall be the first laid off."

"ARTICLE X

Effective April 1, 1955

All regular employees shall be guaranteed a full week's work."

IV

Defendants admit that from May 27, 1958, to June 4, 1958, Local 174 maintained a one-man picket near the plaintiff's place of business and that on or about June 4, 1958, plaintiff sought and obtained herein an order temporarily enjoining the aforesaid picket, but otherwise deny the allegations of paragraph IV of the Second Amended Complaint.

V

Defendants have no information as to the facts alleged in paragraph V of the Second Amended Complaint and therefore deny the same.

VI

Defendants deny that the picketing was solely intended to coerce the plaintiff, but otherwise admit the allegations in paragraph VI of the Second Amended Complaint.

VII

Defendants deny that the arbitration alleged in paragraph VII of the Second Amended Complaint was pursuant to order of this court entered June 4, 1958, but otherwise admit the allegations contained in paragraph VII of the Second Amended Complaint.

VIII

Defendants admit the allegations of paragraph VIII of the Second Amended Complaint as deleted by the court's [fol. T] order to strike the last sentence thereof.

And for a further answer and affirmative defense, defendants allege as follows:

I

The picketing set forth in the Second Amended Complaint was persuasive only and for the mutual aid and protection of an employee of the plaintiff, Melvin T. Welsch, a member of Local 174, and for the protection of Local 174 as representative of the employees of the plaintiff, and for the enforcement of the terms of the agreement referred to in paragraph III of the Second Amended Complaint.

And for a further answer and second affirmative defense, defendants allege as follows:

I

At all times mentioned in this Answer, plaintiff was engaged in the wholesale distribution of flour with its principal place of business in Seattle, Washington.

II

Defendant Local 174 is and at all times mentioned in this Answer was a labor organization representing drivers and helpers in King County, Washington, and was consistently recognized by the plaintiff as the bargaining representative of all employees of the plaintiff except stenographic employees.

III

For many years prior to the date of this Answer Local 174 has executed collective bargaining agreements with the plaintiff on behalf of said employees of the plaintiff regarding wages, hours, and working conditions.

IV

For approximately fifteen years Melvin T. Welsch, hereinafter referred to as "Welsch," has been a member in good standing of Local 174.

V

[fol. U] For more than four years prior to May 27, 1958, Welsch was regularly employed by the plaintiff at plaintiff's warehouse in Seattle, Washington, as receiving and shipping clerk and bull driver.

VI

On May 12, 1958, Welsch injured his legs on the job and, with the approval of the plaintiff, took time off in which to recover from said injury. Upon recovery from said injury, plaintiff on or about May 23, 1958 notified Welsch that he was laid off for a further two weeks without pay. On said May 23, 1958 and for several months thereafter, the plaintiff employed steadily as receiving and shipping clerk and bull driver one Lawrence Anderson who had theretofore been in the plaintiff's employ for only a week or two.

VII

On May 27, 1958, Nick Matula, Business Agent of Local 174, at Welsch's request and in the company of Welsch, visited the plaintiff's officers at plaintiff's plant for the purpose of discussing and negotiating the matter of Welsch's proposed layoff.

VIII

At the outset of said visit the plaintiff announced that Welsch was discharged from its employ as of that date.

IX

Nick Matula thereupon attempted to discuss whether such discharge was fair or in accordance with the agreement between Local 174 and the plaintiff, but the plaintiff's officers refused to discuss the matter, holding to the position that Welsch had been discharged and that there was no area for discussion.

X

Such discharge by the plaintiff and refusal to negotiate [fol. V] was or reasonably appeared to the defendants to be for the purpose of reducing the effectiveness of Local 174 in representing its members and as a protest against the efforts of Local 174 to have Welsch put to work, and as a punishment to Welsch for having sought the assistance of Local 174 in this matter.

XI

In an effort to induce the plaintiff to revoke Welsch's discharge, Local 174 placed a one-man picket in an automobile stationed 35 feet west of the northwest corner of the plaintiff's warehouse, across two railroad tracks from said warehouse. On the fender of the automobile was draped a banner on which was printed "Unfair to Teamster Local 174." The picket at no time patrolled or coerced anyone, but merely sat inside said automobile.

And for further answer and third affirmative defense, defendants allege as follows:

I

For the past several years plaintiff has conducted a business of flour broker at its warehouse in Seattle, Washington, to which are shipped various types of flour and salt in hundred pound sacks in the following average quantities:

Wheat flour	62,500 sacks per year
Soya flour	1,200 sacks per year
Rice flour	800 sacks per year
Salt	2,000 sacks per year

II

More than 90 per cent of all of the above commodities come from outside of the State of Washington. All of the salt, rice, flour and soya flour comes from outside of the State of Washington, and all but a negligible amount of wheat flour comes from other states.

III

Approximately 40 per cent of the above commodities are [fol. W] shipped by the plaintiff for consumption in Alaska, Oregon, Idaho and Montana.

IV

Plaintiff conducts a business at said warehouse that substantially affects interstate and territorial commerce. Industrial strife and unrest at said warehouse would and did affect, burden and obstruct interstate and territorial commerce.

MacDonald, Hoague & Bayless, Attorneys for Defendants.

Duly sworn to by George Cavano, jurat omitted in printing.

[fol. X] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 521982

[Title omitted]

PLAINTIFF'S REPLY—Filed February 4, 1959

Comes now plaintiff by way of Reply to the affirmative defenses contained in the "Defendants' Answer to Plaintiff's Second Amended Complaint", and admits and denies as follows:

For reply to the first affirmative defense:

I.

Denies each and every allegation contained in the first affirmative defense.

For reply to the second affirmative defense:

I.

Admits the allegations of paragraph I.

II.

Admits that defendant Local 174 is and at all times mentioned in the Answer was a labor organization representing certain persons in King County, Washington, and [fol. Y] denies each and every other allegation of paragraph II.

III.

Denies each and every allegation of paragraph III.

IV.

Plaintiff has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph IV, and therefore denies the same.

V.

Denies the allegations of paragraph V.

VI.

Admits that Melvin T. Welsch was injured on May 12, 1958 on the job as an employee of plaintiff; admits that said employee took time off with plaintiff's permission; admits that in May, 1958 and thereafter plaintiff employed one Lawrence Anderson; denies each and every other allegation of paragraph VI.

VII.

Admits that on May 27, 1958 a representative of defendant Local 174, in the company of Melvin T. Welsch, visited the plaintiff's plant, and denies each and every other allegation of paragraph VII.

VIII.

Admits that on May 27, 1958 plaintiff through its officers or agents advised the aforesaid representatives of defendant Local 174 that Melvin T. Welsch had been dis- [fol. Z] charged, and denies each and every other allegation of paragraph VIII.

IX.

Denies the allegations of paragraphs IX and X.

X.

Admits that Local 174 picketed plaintiff's plant, and among other things placed one or more pickets as described in paragraph XI, and denies each and every other allegation of said paragraph.

For reply to the third affirmative defense:

I.

Admits that plaintiff has conducted the wholesale flour business in Seattle, Washington for several years and denies each and every other allegation contained in the third affirmative defense.

And for further reply, plaintiff demurs to the first, second and third affirmative defenses on the ground that said defenses and each of them fail to allege facts constituting a defense to the Second Amended Complaint.

Wherefore, having fully replied to the affirmative allegations contained in Defendants' Answer to Plaintiff's Second Amended Complaint herein, plaintiff again prays [fol. AA] for judgment and relief in accordance with the prayer of the Second Amended Complaint herein.

Allen, DeGarmo & Leedy, Attorneys for Plaintiff.

Office and Post Office Address: 1308-1320 Northern Life Tower, Seattle 1, Washington.

Duly sworn to by Nick Lucas, jurat omitted in printing.

[File endorsement omitted]

[fol. 3]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 521 982

LUCAS FLOUR COMPANY, a Washington corporation,
Plaintiff,

vs.

LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA,
an unincorporated Association, Defendant.

Statement of Facts

Be It Remembered, that on Monday, March 16, 1959, at the hour of 9:30 o'clock A.M., the above-entitled action came regularly on for trial before the Honorable Raymond Royal, one of the Judges of the Superior Court of the State of Washington for King County, sitting in Department No. 12.

APPEARANCES

The Plaintiff was represented by Stuart G. Oles, Esq., its attorney and counsel;

The Defendant was represented by Francis Hoague, Esq. and Kenneth A. MacDonald, Esq., its attorneys and counsel;

Whereupon, the following proceedings were had and done, to-wit:

[fol. 4] The Court: Are the parties and counsel ready in the case of Lucas Flour Company, plaintiff, versus Nugent LaPoma and others, defendant?

Mr. Hoague: Defendant is ready.

Mr. Oles: Plaintiff is ready, your Honor.

The Court: Do you desire to make an opening statement?

Mr. Hoague: Before your opening statement you have some motions to make and I have a motion to make. I wonder if that would be in order, your motion to amend?

Mr. Oles: Yes, I was going to do it as part of the opening statement.

We have given a notice of trial amendment, the original of which I am sure is in the file, your Honor. We refer only to the damages claimed and their itemization.

Mr. Hoague: We have no objection.

The Court: Is that the trial amendment filed on the date of March 6, 1959?

Mr. Oles: That is about right, your Honor.

The Court: No objection?

MOTION TO DISMISS AS TO CERTAIN PARTIES AND GRANTING THEREOF

Mr. Hoague: No objection.

May I make a motion? Defendant moves to dismiss this action against John Doe I, II, and III because they have not been named in all of the three Complaints. Plaintiff reserved the right to substitute names. Such substitutions haven't been made. We don't know who they are; we don't want to be responsible for defending people who are unnamed. I don't believe it affects your case substan-

[fol. 5] tially.

Mr. Oles: I thought the defense counsel had appeared for John Doe I, II, and III.

The Court: I suppose if you haven't figured out who they are, we are going to take them out.

Mr. Oles: We have no objection to the cause of action being dismissed against John Doe I, II, and III, if dismissal is without prejudice.

The Court: I suppose that would be in order. Motion is granted to dismiss the action without prejudice as to John Doe I, II, and III.

Does that take care of the technical matters before we go into the merits of the case?

Mr. Hoague: That is all.

The Court: Whenever you are ready.

Mr. Oles: Yes, your Honor.

With the permission of the Court, I would like to give a little more extensive opening statement than normal in a non-jury case with the hope that it will clarify the issues and possibly narrow them.

There has been no pre-trial conference in this case and possibly an opening statement may in a way serve to perform some of the functions of that type of conference.

The plaintiff, your Honor, in this case is Lucas Flour Company, a Washington corporation. Two of the officers are in court at the present time who will testify in the course of the case. Mr. Nick Lucas, the vice-president, who is sitting nearest to me, and Mr. Pete Conom, who is secre- [fol. 6] tary-treasurer, sits at the end of the counsel table. That name is spelled C-o-n-o-m.

The Lucas Flour Company, as I say, is the plaintiff; the defendant is Nugent LaPoma, who is the treasurer and secretary of the Teamsters' Local 174 and the principal executive officer of that Union and the Local itself.

Local 174 is an affiliate of the International Association of Teamsters and the Local is an unincorporated association.

The nature of plaintiff's business will be described in some detail by the witnesses, but it is in the business of selling flour at wholesale to consumers at wholesale in the Northwest area, principally Seattle, Tacoma, Spokane, and so forth.

The plaintiff corporation at all times has been a party to a labor agreement between the plaintiff corporation and the defendant Local. Copies of this labor agreement will be placed in evidence.

I may say that there is in the file a copy attached to one of the pleadings and in addition copies will be placed in evidence and provided to the Court. I am having my office prepare a number of copies of pertinent matters in this case for the convenience of both Court and counsel, and after the noon recess those will become available to us. I am sorry that somehow starting cases on Monday morning, the office doesn't get these papers out in time for usefulness in trial. They will be available, as I say, at 1:30.

The contract, if I may summarize pertinent portions, [fol. 7] provides in part that it is a so-called "union shop agreement", a collective bargaining agreement in which the defendant Union represents the employees of the plaintiff in collective bargaining. It includes a provision that the employer, Lucas Flour Company, reserves the right to discharge any employee whose services are unsatisfactory to the employer. It further provides that in the event a dispute arises between the parties, that dispute is to be arbitrated; first by a representative of each side meeting together, and if they do not agree, then the two arbitrators are to appoint a third and they shall again meet and the decision of any two out of three will be final. Actually, I think it provides a decision of the third party is final in the agreement.

Now, one of the employees, prior to the event which gave rise to this lawsuit, one of the employees of plaintiff corporation was a warehouseman by the name of Melvin Welsch. Mr. Welsch was fired on May 26, 1958.

Prior history of the events which led to Mr. Welsch's discharge in the view of the plaintiff are merged into the findings of the Board of Arbitration which subsequently met. Therefore, the plaintiff is taking the position that these are facts already determined. They are in the record as part of the record of arbitration on file herein. A record will also be placed in evidence in the form of an exhibit, as I say, after the noon recess. I don't even intend at this time, with the Court's permission, to summarize it except [fol. 8] to say that the outcome was substantially favorable to the employer's position; that the employee was unsatisfactory and was terminated for that reason.

In any event, the defendant Local took a different position and the evidence will show that the defendant Local demanded that the employer put Mr. Welsch back on the payroll. The employer refused to do this, and commencing on the 27th of May, 1958, the defendant Local called its members, who were employees of the plaintiff, out on strike and placed certain pickets. The exact nature and character of that picketing will be described by the testimony. It is in substance enough to say that in addition to picketing at the place of business, plaintiff will produce evidence that

pickets sought to interfere, actively interfere, with deliveries by the plaintiff corporation to its customers; even to the extent of following deliveries around town, and otherwise interfering with the delivery activities.

This action was commenced at a date which I am sure is shown in the file, but I note that apparently the Complaint was subscribed and sworn to on the 27th day of May, 1958, the same day that the picketing commenced. And unless my memory serves me ill, either that afternoon or the next morning this action was filed in the Superior Court of this County and in this number. The Court issued on the same day, the 27th of May, over the signature of Judge Shorett, an order to show cause directing that this case be brought on for hearing on the 2nd of June. Thereafter a hearing was held, as I recall, on the 4th of June, before [fol. 9] Judge Walterskirchen of this Court. There was a hearing and argument and the Court will observe in the file a number of affidavits, both for plaintiff and defendant in connection with the application for injunction.

Following that hearing Judge Walterskirchen issued an order, indicated the 4th of June, 1958, in the form of a temporary injunction, enjoining the continuance of the strike and of the picketing, and in effect directing that arbitration in accordance with the contract proceed on the issue of whether or not Mr. Welsch was fired under circumstances permitted by the contract between the employer and the Union or not. No appeal was taken by the union from this temporary injunction and the union complied with that order.

In accordance with the suggestion or requirement of Judge Walterskirchen that arbitration proceed in accordance with the contract, arbitration did take place and the parties in connection therewith entered into a stipulation which the Court will find on file, called, if I recall correctly, Record of Arbitration. Unfortunately, my copies are being copied in turn at my office, so that additional copies may be utilized in the trial. But the parties entered into a stipulation.

The Court: Is that record of arbitration Exhibit A to the Amended Complaint?

Mr. Oles: Yes, your Honor.

The Court: Then the document you are referring to is dated September 11, 1958?

[fol. 10] Mr. Oles: That would be correct, Exhibit A to the Amended Complaint dated September 11, 1958.

It will be observed by the Court what the parties agreed to there.

The Court now having read the Record of Arbitration, which speaks for itself, understands the basis on which arbitration proceeded and the personnel who sat on the Board of Arbitration.

There followed after the date of September 11, 1958, a series of hearings before the arbitrators, the extensiveness of which may be indicated by showing to the Court a copy of the transcript of the proceedings totaling some 180 pages of testimony, excluding arguments, as I recall, before the Board of Arbitration.

That Board met on more than one occasion in September, and as I recall, in October, of 1958. Thereafter and following this hearing, or the series of hearings, the arbitrators issued an award of arbitration, which is on file as Exhibit B to the Second Amended Complaint, and which will again be offered into evidence in the course of this trial. The Court will observe that is dated November 7, 1958, and signed by two of the arbitrators.

I will call to the Court's attention that the Arbitration Record, already referred to, stipulated in part that in the event the arbitrators are in variance in deciding any issue, the unanimous decision of any two of said arbitrators on said issue shall be final and binding on the parties as to that issue. And I think it is not inapropos to say to the Court [fol. 11] that the plaintiff now contends and will contend in the course of this trial that the findings contained in this opinion and award of arbitration are binding upon the parties and are not necessary to again be litigated in the course of this trial.

The Court will observe at the end of the November 7th Award of Arbitrators a place for the third member to dissent, but that was not in fact signed. I do not know the reason for that. Whether he just didn't get around to signing it or whether that did not represent his position, I do not know. All I know is that after some effort to com-

plete the record by Mr. Briem's signature, I am advised that it wasn't able to be obtained. That award, as I say, is now on file.

The opinion was in fact, I think it is not improper to say, dictated by, prepared by Mr. Harry Margolis, the third member of the Board of Arbitrators, and a man of great experience in the field of labor law.

The findings and opinion, as the Court will find in examining it, are very thorough and comprise a complete history of the events leading to the strike and picketing which are at issue in this case.

In substance the findings are twofold: that the work of Melvin T. Welsch was unsatisfactory for reasons detailed, and, two, that such unsatisfactory work was the reason for his discharge by the Lucas Flour Company. The arbitrators further found that Melvin Welsch was not entitled to be reinstated as an employee, which was the issue pre-
[fol. 12] sented to them by stipulation of arbitration.

I may say, although I do not think it may be very important here, that before the arbitration took place, before these three arbitrators, there was a preliminary arbitration as required under the contract in which just the two appeared, that is, Mr. Pickle and Mr. Briem. They held a hearing at which witnesses testified, and I don't believe there is any record of that or any stenographic transcript. But in any event they agreed to disagree as a result of that and that resulted in the further hearings before the three-man Board.

Now, in the pre-trial, your Honor, coming on to trial in connection with a Second Amended Complaint, are two issues to be decided by this Court: One is the application for permanent injunction in place of the temporary injunction, and, secondly, the claim of plaintiff for damage arising out of the strike. Now, obviously the injunction at this point, if not moot, at least is not a serious issue to be decided. There is no picketing, the defendant having complied with the previous order of the Court. And I think I can assume the Union doesn't intend to resume picketing, the arbitration having been decided contrary to it. So the application for permanent injunction in conjunction with the dispute which here arose is, I presume,

a matter of course. It doesn't make a great deal of difference one way or the other in this stage what occurs to that portion, so our case will be directed at and concerned [fol. 13] with primarily the issue of damages.

It is the purpose of the plaintiff not to present evidence as to events preceding the 27th of May, 1958.

The Court: What was that date?

Mr. Oles: May 27, 1958. That was the date when the strike commenced, it being, as I have already indicated to the Court, the position of the plaintiff that the facts as to what took place prior to that date have been determined once and for all by the Award of Arbitrators. What we do intend to prove is, one, the nature of the picketing and the strike, what occurred; secondly, we expect to prove what the effect of this picketing and striking activity was upon plaintiff's business, upon its relations with its customers; and thirdly, we expect to produce in considerable detail to the Court by competent witnesses the facts and figures taken from the books and records of the Lucas Flour Company to show in dollars and cents the effect that this strike and picketing had upon the business of the plaintiff.

At 1:30 I will present to the Court, and I am sure by stipulation there can be offered into evidence, the contract between the parties, that is the labor collective bargaining agreement, a copy of the Record of Arbitration, and a copy, of course, of the Award of Arbitrators.

At this time, however, and in addition to offering these documents at that time, we would ask the Court, as I believe the rules require us to do, to take judicial notice of the [fol. 14] records and files in this court and cause, insofar as they show the original Record of Arbitration and the findings therein contained and the events which have previously transpired in this cause. And we ask the Court to take judicial notice and to indicate its rulings on that issue at this stage so we can eliminate formal testimony in support of some of the assertions I have just made.

The Court: You are speaking of the official record and files maintained by the Clerk of the Court which have been handed to me by my bailiff prior to the commencement of this action?

Mr. Oles: That is all to which I have reference, merely asking the Court to take judicial notice of the contents of that file.

The Court: That is the procedure upon which I have always operated; is there any basis to change that procedure?

Mr. Hoague: We don't oppose it, whether it is right or wrong.

The Court: I assume that it is correct. We will take judicial notice of the file, and I think we have a duty to do that.

Mr. Oles: Thank you, your Honor.

This completes our opening statement.

PARTIAL OPENING STATEMENT OF MR. HOAGUE

Mr. Hoague: I don't believe I will make a complete opening statement at this time.

There are a few things that I think would aid the Court in hearing the plaintiff's case. First of all, over the tele- [fol. 15] phone, Friday, I believe, with Mr. Oles—I want you to agree to this, Mr. Oles, while I am saying it—we stipulated that the plaintiff is engaged in interstate commerce within the meaning of the Labor Management Relations Act of the Federal Government. Am I correct in that stipulation?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Oles: The plaintiff will stipulate to that, that is correct; by so stipulating, of course, we do not admit that is either relevant or material.

Mr. Hoague: This avoids the proof as to how much they buy from out of the State and how much they sell out of the State, which we would otherwise have to put in.

Mr. Oles: Let me put it this way: Obviously, the National Labor Relations Act only applies to interstate commerce. The National Labor Relations Board has within the last year laid down what it conceives to be the test of what constitutes interstate commerce. That is the last word that exists on this subject that I know of. Of course, the NLRB is not the final authority, but I don't know of any more

recent matters. The plaintiff is engaged in interstate commerce within the meaning of the Labor Relations Board.

The Court: Your stipulation is then as to those facts?

Mr. Oles: That is correct.

The Court: So we won't have to put in any proof?

Mr. Oles: I don't want to stipulate as to some conclusion of law. I conceivably at some stage could argue that [fol. 16] the National Labor Relations Board is wrong, and that they do not have and would not have jurisdiction of any matters involving this company.

Mr. Hoague: Are you reserving that right?

Mr. Oles: I am reserving the right to question the law, but I concede that the plaintiff has a sufficient volume of interstate commerce in its importations of goods to fall within the test currently acceptable to the National Labor Relations Board.

The Court: Mr. Oles' stipulation is to the fact of whether or not the plaintiff is engaged in interstate commerce within the most recent interpretation by the Federal agency as to what constitutes interstate commerce, so there will be no necessity for the defendant to put any evidence in to prove whether or not as a matter of fact the plaintiff is engaged in interstate commerce.

Mr. Oles: I am just advised by the treasurer of the company, for the record, the facts are that the company in connection with its sale of flour brings into the state and then sells here—that is business from out of the state—flour which it then re-sells at wholesale in this state, at a cost of approximately $400,000 annually.

Mr. Hoague: All right, fine, we can stipulate to that; that is enough for my purposes.

The Court: Legally if it should come up, we will have to take it up. As long as we understand the stipulation, I think we can proceed.

Mr. Hoague: I don't want to be bound by the correctness [fol. 17] of the interpretation of the Labor Board; that is the only thing I am worried about. Supposing it is upset, then this would leave me with nothing. I believe the $400,000 and the total annual business of the plaintiff will be put in evidence so that we will know how large a proportion is in interstate commerce, and I believe that is enough to bring it within the Federal Act.

The Court: Of course, it could happen that you would have to put in some evidence and we will take time to do that.

Mr. Hoague: I wouldn't want to do that after the case is all over.

Mr. Oles: This is a case that just conceivably, your Honor, somebody may decide is a case of a leading legal point, I don't know, but should we narrow the stipulation, if you don't think I am backing up,—stipulate to the fact that Lucas Flour Company imports from outside of the State of Washington in interstate commerce approximately $400,000 a year and that that represents the great proportion of the goods which it then resells. That should be all the facts you need.

Mr. Hoague: I should also like to say offhand how much you sell outside of the state, 1%?

The Court: Interstate commerce arises from the purchase rather than the sale?

Mr. Oles: Yes, your Honor.

The Court: Would it be important to stipulate as to what percentage in terms of actual numbers of percentage?

[fol. 18] Mr. Oles: About 60%, your Honor, of their purchases are outside of the State of Washington.

Mr. Hoague: Comes from outside of the State of Washington?

Mr. Oles: Yes.

Mr. Hoague: That will be satisfactory.

The Court: That covers the factual issues.

Mr. Hoague: Item No. 2 is that Nugent LaPoma, who is the lead name in the masthead of the case, was dismissed by consent order, isn't that correct?

Mr. Oles: Was it?

Mr. Hoague: Yes. There is a dismissal in the file.

The Court: Does that mean we don't have any defendant left?

Mr. Hoague: One more.

Mr. Oles: That is correct; that on 12 January, defendant LaPoma was dismissed from the action.

The Court: The only defendant is Local 174?

Mr. Hoague: That is correct.

The Court: Why don't we make the title correct on all subsequent papers to conform with our orders and have your girls type it up to show Local 174 and whatever is the official title.

Mr. Hoague: We agree with Mr. Oles that the Award of the Arbitration is binding. We will present testimony as to matters before May 27, or will have testimony on the ground that the award of the arbitrators did not decide, and they did not have the authority to decide, the purpose or the aim of the picketing, and the legality or illegality [fol. 19] of picketing depends very largely on the aims and purposes of the picketing. This has to be shown by testimony before May 27, so that we will put in.

Also, the award of arbitration decided that the discharge was on May 27 and not May 26, and I believe that that is binding; and that is of considerable importance in this case because the picketing started on May 27, right after the plaintiff first told Mr. Welsch, who is the employee, that he was discharged as of that date. The picket sign was brought down about fifteen minutes later and the picketing started.

With those few comments I think I will reserve possible further opening statement until later.

The Court: The plaintiff may proceed with its evidence.

Mr. Oles: May I complete a note here for one moment?

The Court: Yes, go ahead.

Mr. Oles: We will call Mr. Nick Lucas as a witness, your Honor.

Nick Lucas, called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Oles:

Q. Mr. Lucas, will you kindly state your name and your home address?

A. Nick Lucas, 2617 27th Avenue West, Seattle, Washington.

[fol. 20] Q. And what is your occupation, sir?

A. Salesman.

Q. And do you have a title as an officer of the plaintiff corporation?

A. Vice-president of Lucas Flour Company.

Q. How long have you been associated with Lucas Flour Company?

A. Approximately seven years.

Q. Now, is Lucas Flour Company a corporation?

A. Yes.

Mr. Oles: Mr. Hoague, if I may interrupt the examination at this point, may it be stipulated that Lucas Flour Company is a corporation organized and existing under the laws of the State of Washington and has paid all fees and taxes required by the State of Washington to qualify it to bring action?

Mr. Hoague: That is agreed to.

By Mr. Oles:

Q. I assume that is correct, is it not, Mr. Lucas?

A. Yes, sir.

The Court: Suppose he had answered "No," where would the stipulation have been?

Mr. Oles: I wouldn't have asked it.

By Mr. Oles:

Q. Who are the officers of the Lucas Flour Company?

A. Mr. John Lucas, president; myself, Nick Lucas, vice-president; and Mr. Peter Conom, secretary-treasurer.

Q. Would you spell the last name for the benefit of the Court?

A. P-e-t-e-r C-o-n-o-m.

[fol. 21] Q. Where is the place of business of the Lucas Flour Company?

A. 929 Homer Street, Seattle 8, Washington.

Q. Now, briefly, what kind of an establishmen' do you have down there, what kind of a building and so on?

A. We have a la[illegible]e concrete construction warehouse.

Q. And offices, too?

A. And offices. The offices of the company are located in the same building.

Q. Do you have a railroad track siding next to the warehouse?

A. Yes, sir.

Q. And also a truck loading area?

A. A truck loading and unloading.

Q. What is the nature of the Lucas Flour Company's business?

A. We are a wholesale distributor of flour.

Q. And how are shipments received?

A. We receive shipments by rail, by truck, and sometimes by boat, which is transferred from the dock to the warehouse by trucks.

Q. Do you have trucks of your own?

A. Yes, sir.

Q. One or more?

A. More than one; two, and sometimes more.

Q. And do you store flour in your warehouse?

A. Yes.

Q. And then you ship it out to your customers?

A. We distribute it by trucks to our customers.

Q. By your own trucks?

A. And by other freights also.

[fol. 22] Q. To whom? Who are your customers? What business are they in?

A. Most of our customers, I would say 100%, are bakeries.

Q. Large or small bakeries?

A. Large or small bakeries and a few restaurants, hotels and restaurants.

Q. Restaurants that do their own baking?

A. Yes, sir.

Q. And how many customers do you have, approximately?

A. A few hundred.

Q. Several hundred?

A. Several hundred.

Q. In what area?

A. In the State of Washington area; the biggest percentage Seattle, Tacoma, Everett, closer towns, larger towns.

Q. Do you handle several different lines of flour products or primarily one, or what?

A. Primarily one.

Q. That is what?

A. It is Pillsbury Flour Mills.

Q. How many employees do you have besides the officers whom you have just named?

A. Three or four or more.

Q. Three or four?

A. We have two truck drivers, office help, which is the office secretary, and whenever it is needed we hire extra help.

Q. Do the truck drivers also serve as warehousemen in your warehouse, or how do you handle that?

A. Yes, one of them is a truck driver when he is needed [fol. 23] and a warehouseman.

Q. How do you move flour back and forth within your warehouse?

A. With a fork lift.

Q. Fork lift trucks. What you have just described as to the nature of your business and the number of your employees and the general duties, is that substantially true also for the year 1958?

A. Yes, sir.

Q. Now, who is Melvin Welsch?

A. Melvin Welsch was employed by our company as a warehouseman prior to May 26, 1958.

Q. Incidentally, he was not known as Melvin normally?

A. He was known as Jack Welsch.

Q. Now, when were his services terminated with Lucas Flour Company?

A. May 26, 1958.

Q. May 26, 1958?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Hoague: I object to that and ask it be stricken on the ground that this is within the Award of Arbitration and has been decided as May 27.

In the last page, your Honor.

The Court: Findings of Fact No. 2.

Mr. Hoague: And there are others on the first page. Also,

"Melvin Welsch was employed by this firm for a period of five years up to May 27, 1958, when he was discharged."

The Court: Well, let's test out the Court's understanding as we started the case. It is my understanding you [fol. 24] intended the Court to be bound by the facts contained in the Award of the arbitrators, which is Exhibit B attached to the Second Amended Complaint. That being the case, is not this Court bound, under that principle, to this fact set forth in the Award rather than the testimony of this witness?

Mr. Oles: I think the Court is bound to every fact found by the Award of the arbitrators. I am inclined to believe that the arbitrators did not intend to make a finding that the time of discharge was May 27. Referring to the 2nd Finding of Fact, the date is there by way of recitation rather than of a finding, and actually on page 6 the arbitrators tackled this particular problem, which was a little difficult in the record, and I would like to call it to the Court's attention, the language beginning near the top of page 6, beginning as follows, and I would like to quote:

"By this time, the employer had definitely decided to fire Welsch, but had not quite determined how to go about it. On May 26, Welsch returned to the warehouse for the first time since his injury two weeks before."

Then skipping down,

"That same day, Monday, May 26, representatives of the Union and the employer conferred by telephone. There is quite a dispute in the record as to who said what, but on the following morning the Union business agent called upon the employer.

[fol. 25] "That mo ing, Tuesday, May 27, the business agent was informed by the employer's representative that Welsch was fired as of then, giving 'unsatisfactory work' as the reason. As far as the record shows, this was the first indication by the employer to

anyone, following the accident of May 12, that Welsch was discharged."

I am inclined to believe this, that this constitutes a finding that there is a dispute, but as far as the record indicated, there definitely was a discharge as of May 27. I call to the Court's attention that there was nothing in the problem before the arbitrators that made it an issue as to whether it was May 26 or 27. I am inclined to believe that there is a finding by the arbitrators that actually in context that the only finding they would make is that at least as of May 27 he was terminated.

I don't think they necessarily decided to foreclose the possibility because that wasn't an issue, that he was discharged, in the conversation between Mr. Lucas and the business agent, the day before.

Mr. Hoague: Your Honor, I take issue with Mr. Oles as to whether this was an issue. This was very definitely an issue. A great deal of testimony was taken as to whether there was a discharge on the 26th, because they had indicated by a note given to Mr. Welsch on May 23 that they were not discharging him, that they were asking him to take "vacation" which the Union insisted was laying him off in viola- [fol. 26] tion of the seniority agreement. Then as to whether the discharge on the 27th was justified on the grounds of his being unsatisfactory or whether it was merely a ruse to get around the seniority agreement, it was very clearly in evidence. And whether they had notified on May 26 that he was unsatisfactory, you see, would have a very direct bearing on the question of whether this was just a sudden turn-about and it was an issue and there was a great deal of testimony. We have the transcript written up. I believe this is a Finding and I believe it is conclusive.

The Court: The Court will rule that the Award of the arbitrators Findings find as a fact that Melvin Welsch, also known as Jack Welsch, was fired as of May 27, referring to the language in the first full paragraph on page 6 of that Award, which is about the middle of the page.

Any evidence which would be in rebuttal of this testimony has to establish the actual accomplished fact of firing as within the language of that paragraph, would not be ap-

propriate if offered for the purpose of rebutting an accomplished fact of firing as of then, to-wit, May 27th. Therefore, I will sustain the objection.

In the event that the issue is more complicated than would appear at the moment, Mr. Oles would have available to him the opportunity to make an offer of proof as to the legal issues that may develop.

Mr. Oles: I certainly except to the Court's ruling. I am going to ask Mr. Lucas exactly what was said in con- [fol. 27] nection with these events, and if in the course of it he makes reference to comments that occurred on May 26, it is not being offered to rebut or overturn the award. Of course, he cannot testify as to other than the facts are, whatever they may be, and certainly not offered to rebut or overturn whatever the findings are.

The Court: We will understand that as a result of misunderstanding of semantics there isn't a complete understanding between the questioning of the attorney and the witness. In any event, if you do ask a question which would invite, or a question would be answered in a way to violate the spirit of this ruling, Mr. Hoague would be objecting to it and I would give him a running objection.

Mr. Hoague: It just won't be considered as testimony in conflict with the award.

The Court: And Mr. Oles may have something in mind which may appear later in this proceeding.

As you know, I have not had time to read your briefs. I would not want to make a ruling which would be awkward to get around in the event I get further insight in the case. I only want to go as far as necessary to accomplish this purpose at this time.

You may proceed.

Mr. Oles: Thank you, your Honor.

By Mr. Oles:

Q. Did you have a contract with Local 174? And by "you" I mean the Lucas Flour Company at the time of the events here in question?

A. Yes, we did.

Mr. Oles: And again I apologize to the Court. I will offer a specific exhibit, I am sure by stipulation, after the noon hour. There is however a copy of the contract on file and also the award of arbitrators contains a synopsis of the pertinent provisions.

With the permission of kind and helpful Mr. Hoague, your Honor, I would like to have his copy of this agreement marked.

The Court: Is that the same thing?

Mr. Oles: I guess.

The Court: I just wanted to know what I could safely read.

(Ledger sheet marked Plaintiff's Exhibit No. 2 for identification.)

The Court: You are talking about another one? We might be at cross purposes. But I can rely on the theory of both litigants here that I am reading from this yellow document that is attached in Item 28 of the file, filed on March 12, 1959, entitled "Private Carrier Agreement," that we are talking about this item that has been introduced as Exhibit 2.

Mr. Oles: May I inquire what Exhibit No. 1 was?

The Clerk: 1 was the agreement.

The Court: That must have been put in.

Mr. Oles: That must have gone in at a previous stage and if the Court can do it without a major disruption, let's withdraw Exhibit 2 right now and forget it ever happened.

[fol. 29] The Court: I can still rely on this one in the file?

Mr. Oles: Yes, your Honor, you may.

The Court: It is already admitted.

(Whereupon, Plaintiff's Exhibit No. 2 for identification was received in evidence.)

Mr. Hoague: We will stipulate that Exhibit 1 was also signed by the company. Actually the company's signature is not on Exhibit 1, but a copy was signed by the company, is that correct?

Mr. Oles: Yes.

I would like to further ask you, Mr. Hoague, the agreement is a three-year agreement terminating April 1, 1958,

but to continue thereafter from year to year unless reopened by giving notice in writing? I would like it stipulated that this agreement insofar as pertinent to the issue in this case was in effect at all times pertinent hereto, that a subsequent agreement changing only certain wages and working conditions has been entered into, but makes no changes in the provisions pertinent to this?

Mr. Hoague: I have never seen this copy. I have only seen the yellow sheet.

I stipulate to that; that it was in effect.

Mr. Oles: And this I take it has been admitted at some stage?

The Court: That is what my record now shows; if it hasn't, we admit it.

Mr. Oles: Thank you, your Honor.

(Whereupon, Plaintiff's Exhibit No. 1 for identification was received in evidence.)

[fol. 30] By Mr. Oles:

Q. Now, Mr. Lucas, at the time of the termination of Mr. Welsch's employment, his employment I should say, with Lucas Flour Company, did you have any conversation with a representative of Local 174 relative to his discharge?

A. Yes, I did.

Q. With whom did you converse?

A. With Mr. Rus Anderson.

Q. What was Mr. Rus Anderson's position at that time, do you know?

A. He was the agent for Local 174.

Mr. Oles: Perhaps it could be stipulated he was then vice-president, vice-president and business agent of Local 174. Is that agreeable, Mr. Hoague?

Mr. Hoague: That is agreeable.

By Mr. Oles:

Q. And what, if anything, did he say to you about the discharge of Mr. Welsch?

Mr. Hoague: When was that conversation? Where was it?

By Mr. Oles:

Q. When and where did this conversation take place?

A. The conversation took place over the telephone Monday, May 26, 1958.

Q. And what if anything was said about the discharge of Mr. Welsch?

A. I was asked to rehire Jack Welsch and I refused to rehire him.

Q. Did he say anything to you about what would be done by the Union?

A. He says, "Why?" And I mentioned to him that he [fol. 31] was discharged, and he says, "I'll see you tomorrow morning."

Mr. Hoague: I object to the answer not being responsive and ask it be stricken.

The Court: Motion granted. You may ask another question.

By Mr. Oles:

Q. Did you have any conversation with anybody the next morning representing the Union?

A. Mr. Matula and Jack Welsch, Tuesday, the 27th, 8:00 o'clock in the morning.

Q. Who was Mr. Matula, if you know?

A. Didn't know his exact position. I thought he was sort of business agent with the Union. He was representing the Union, he told me.

Q. And when and where did this conversation take place?

A. In our office.

Q. What if anything did Mr. Matula say to you about the discharge of Mr. Welsch?

A. He asked me when he came in to hire Jack Welsch. I said, "No, Jack Welsch has been discharged." And he asked me on what grounds. And I said, "For unsatisfactory work." And that is all that was said. He asked me to use the phone.

Q. And did he use your phone?

A. He used the phone.

Q. Your phone?

A. Our phone at my desk. I could tell he called the Union.
Q. What did he say, if you heard it?
A. He says,—I can't recollect exactly, sounded like "They are not taking him back; bring the signs."
[fol. 32] Q. "Bring the signs", something like that?

Mr. Hoague: May I have that answer read back?

(Last answer read by the Reporter.)

By Mr. Oles:

Q. Then what occurred?
A. Within the hour we had pickets in front of our place and they asked the rest of our employees to walk out and we were picketed and on strike.
Q. Did the other employees walk out?
A. Yes, sir.
Q. Were they all members of 174?
A. They were.

Mr. Hoague: May I ask a question on voir dire? Did you hear anybody asking the other employees to walk out?
Mr. Oles: I think I object to that, Mr. Hoague, you made no objection to the question.
The Court: No purpose for voir dire examination. Now is the time for direct examination.
Mr. Hoague: No, the reason is I expect it is hearsay.
Mr. Oles: Your suspicions may not be justified.
The Court: I am lost on the question. Could the Reporter find the question?
Mr. Hoague: The question was perfectly legitimate.
The Court: You are objecting to the last portion of that answer?
Mr. Hoague: I suspect that it is hearsay, I think. Sometimes with the Court's permission I am entitled to just ask [fol. 33] a question, whether he did hear anybody ask the employees.
The Court: You are not objecting to that itself being hearsay; you think it is based on hearsay?
Mr. Hoague: I think it is based on hearsay. I don't want it to go into evidence that this was done.

The Court: Why don't you make a note and then on cross examination you can ask some questions, and then if that is based on hearsay we will disregard it.

Mr. Oles: In that connection, that may be the Court's ruling and I don't want to challenge it.

The Court: I didn't mean to say what I will do. We will consider your hearsay objection if you can establish that was hearsay, and I will make the proper ruling at that time.

Mr. Oles: This question is going to arise in another position in this trial in connection with the deposition that has been taken. I would like to make my position clear, and that is I conceive that the law is if there is no objection made to a question and an answer is made, that the fact that it is hearsay may be a question that pertains to the credibility or its weight, but neither the question or answer are to be disregarded or stricken and that the objection is waived if it isn't made, in any event.

Mr. Hoague: I don't agree with that.

Mr. Oles: We will argue the law later, but I don't feel there is anything wrong with his testimony.

The Court: Well, it is a matter of waiving the objection to hearsay and it is something which the Court has to observe from the timing and everything else. Sometimes [fol. 34] counsel is writing and he can't make his objection quite as rapidly, and sometimes the hearsay answer is out before he can really get it through his head that it has happened. It depends on the circumstances, but I think it is correct in general if there is no objection to hearsay and it was intended on the part of the opponent not to object to it, then they waive the claim of hearsay.

Mr. Oles: Shall I proceed, your Honor?

The Court: Proceed.

By Mr. Oles:

Q. Now, you say they brought in pickets? Now just what did these pickets do?

A. They were standing in front of our entrances.

Q. How many were there?

A. The first day, sometimes there were three or four and sometimes two. They were coming and going, so I can't say throughout the day exactly how many there were, but there were always two.

Q. And how did you know they were pickets? How were they identified as such?

A. They had signs on their backs, "Unfair".

Q. What did the signs say?

A. "Unfair to labor," I can't remember exactly.

Q. Did it refer to Lucas Flour Company as such?

A. Yes.

Q. And printed on the sign it said "Lucas Flour Company Unfair"?

A. No, it didn't mention the name.

Q. Didn't mention the name?

A. Not the name "Lucas Flour Company".

[fol. 35] Q. Sort of a universal sign they have for such occasions?

A. I suppose so.

Q. Were these carried by these people?

A. Yes, sir.

Q. Sandwich board fashion?

A. Yes, that was the first two or three days, and then they were hanging to their cars and parked in front of the building with the men sitting in their cars.

Q. Later on?

A. The third or fourth day.

Q. Now, did you have any incidents involving these pickets during that first day of this strike?

A. Incidents?

Q. Did you attempt to make any deliveries that day?

A. Yes, we were attempting to make some small deliveries in our passenger cars because many of our customers started calling up and they were out of supplies and flour. And we attempted to make deliveries of two to three sacks of flour in our cars to the ones that were out. And I myself was followed by one of the Union members.

Q. Describe that following. How did it occur?

A. He was following me in his car.

Mr. Hoague: I object to this. This isn't alleged. All that is alleged in the Complaint is picketing. There is no allegation of following or coercion or anything of the sort. This doesn't come under picketing, I believe.

The Court: Overruled.

By Mr. Oles:

Q. Would you go ahead, Mr. Lucas?

[fol. 36] A. I started from our place with about three or four sacks of flour in my car and I was followed by Mr. Rus Anderson in his automobile and I noticed he was following me so I stopped at the Georgetown police station, and I talked to the sergeant on duty, and I said, "There is a man following me." And of course he didn't do anything. He says, "As long as he hasn't talked to you, nothing I can do about it." So I started again and I went to my first account where I was supposed to leave some flour. And he followed me in the office. So I told my customer, "The Union is following me, we have pickets in our place. It is up to you if you like to receive the merchandise." When he looked at the man standing by there, he says, "No, I am sorry. I am afraid to receive it, but I need it and I will appreciate it if you bring it back to me later on this evening."

When I left there I stopped at another place. There is a factory here in town that manufactures doughnut machines, which we sell to the bakeries. They are friends of ours. We have done business with them for a long time, so I asked them if I could leave the flour there. They have nothing to do with the flour business. And I called my customer so he can pick it up from them later. "No," he says, "we employ too many Teamsters here as a machine shop," and he says, "I don't think so, I don't like it." He says, "I would suggest to you, though, why don't you try to lose this man in traffic?" That sounded like a very good idea, so when I [fol. 37] started off I lost him in the downtown Seattle traffic, so I made my deliveries.

Q. This is Mr. Rus Anderson who is sitting here in the courtroom?

A. Yes, sir. He had a '57 Ford.

Q. '57 Ford?

A. Was driving.

Q. Was it in any way identified as a picketing car or did he have any signs?

A. No signs on the car. He was holding a sign in his hand.

Q. In his hands?

A. Yes, sir.

Q. Now, had there been no strike this day, would you have made regular deliveries from your plant?

A. Yes, sir. We never had any interruptions.

Q. Is this also true of the subsequent days of the strike and the picketing? I mean, would you have made deliveries during all the regular business days thereafter?

Mr. Hoague: I object to the form of the question, your Honor. Now we are getting to critical matters. This is strictly leading. He is putting the question and the answer right in the witness' mouth.

The Court: Since the objection is to a leading question, I will have to sustain it.

By Mr. Oles:

Q. Did the strike halt any deliveries, Mr. Lucas?

A. Yes.

Mr. Hoague: Again I object on the same ground.

[fol. 38] The Court: Sustained, a leading question.

By Mr. Oles:

Q. What is your normal practice, Mr. Lucas, as to making deliveries?

A. Our practice is, we are three salesmen on the road. We take orders from these customers throughout the day and then we write them in our order books in the office, then we make deliveries beginning at 8:00 o'clock every morning until 4:30. We might take an order today and deliver it tomorrow; might take an order today and deliver it the same day. We call in the order if it is an emergency, might deliver it two days later. It is not actually a pattern. All the orders and customers work differently. None of them can buy sufficient supplies to last them too long because a lot of them are small bakery shops with not very much, very large storage facilities. So they shop for two days, for three days, for a week.

Q. During the period of the strike, were any large deliveries made, Mr. Lucas?

A. There was no deliveries made at all during the strike except with our own cars, no truck deliveries.

The Court: It is time for our usual morning recess. We will take a ten minute recess at this time.

(Recess.)

Mr. Oles: Mr. Lucas, will you resume the stand, please.

By Mr. Oles:

Q. Before recess, Mr. Lucas, I had asked you a number of questions relating to the effect of the picketing and the [fol. 39] strike upon deliveries made by you. I would now like to ask you what effect, if any, this strike and this picketing that you have described had upon deliveries to the company?

A. Well, all receiving was stopped.

Q. All receiving was stopped?

A. All receiving. Different trucks tried to make deliveries, and were stopped from making deliveries so we couldn't have any supplies at all.

Q. How were they stopped?

A. The men with the picket sign, any time they saw a truck come in, he got up and talked to them. I don't know what was said, but they pulled out.

Q. You saw them talking?

A. Yes, sir, and later on the office of the transfer company called us up and told us we had a delivery but there was nobody to deliver.

Mr. Hoague: I object; that is hearsay.

The Court: Objection sustained.

By Mr. Oles:

Q. Did the transfer company make any deliveries to you during the strike?

A. No, they didn't.

Q. Were any deliveries due during the period of the strike?

A. Yes, there were.

Q. Now, do I understand you, that you actually saw the picket go out and contact the truck driver?

A. Yes, definitely I saw him talking, from the windows.

Q. Your window of your office, does that overlook the front?

[fol. 40] A. Overlooks the street on the second floor.

Q. And your loading dock for trucks?

A. Right under our windows.

Q. Right under your windows?

A. Yes, sir.

Q. You have a recollection of any specific instances of such interference?

A. Yes, Coast-Lee & Eastes is a transfer company name that were unable to deliver.

Mr. Hoague: May I have the answer?

(Last answer read by the Reporter.)

By Mr. Oles:

Q. I don't think you had completed your answer. Have you any other specific examples?

A. There were others.

Q. What other effect, if any, did this strike have upon your deliveries? Any other instances of which you have recollection?

Mr. Hoague: I object to this. I don't want to be too technical, but I think he is asking him to say what effect it had. I think that is for your Honor to determine. He can say what happened, but to say what effect, that is a conclusion that your Honor has to make from the testimony.

The Court: I think the question ended up for specific examples; if the witness understands that to be the impact of the question, I will permit it.

A. What happened is that we couldn't receive any supplies and we couldn't deliver any supplies throughout the district.

By Mr. Oles:

Q. By supplies, what do you mean?

[fol. 41] A. Flour, mainly flours.

Q. How about other things?

A. Well, sugar, also; also we are distributors of sugars for the Amalgamated Sugar Company in this state. And as a matter of fact, Consolidated Freightways, they attempted to make deliveries to our warehouse and they were turned back.

Q. A delivery of what?

A. Sugar.

Q. From Amalgamated?

A. From Amalgamated to our warehouse and turned back, so we told them to unload it someplace else.

Q. What if anything occurred during the period of the strike regarding other types of deliveries to and from your establishment? I refer to such things as laundry and printers and whatever, if anything, you may have had.

A. We have laundry trucks came in and the Kraft men came in, they were all unable to make deliveries.

Q. They were all unable to make deliveries?

A. No, to make deliveries.

Q. Why?

A. Because the men with signs was picketing, stopped them.

Q. Now, how about rail shipments? What happened to the rail shipments?

A. Every morning the railroad brings in cars of flours that we unload into our warehouse, and I have noticed that one of the men that was striking tried to stop the railroad company from delivery, but they didn't succeed. They spotted the cars there so we had an accumulation [fol. 42] of quite a few cars that were unable to unload. The cars were delivered, but there were no men to unload the cars.

Q. Were these placed on a siding?

A. Yes, next to our warehouse.

Q. And did the railroad company charge you for demurrage?

A. Yes, that is the custom.

Q. When did this strike end?

A. The strike ended the afternoon of June 4th, if I am correct.

Q. And if you know, why did it end?

A. We came to court and the Judge awarded us a temporary injunction, and we went to work that evening.

Mr. Oles: I think the record will show that the order of the Court was completed June 4th, Mr. Hoague.

Mr. Hoague: Yes, we will agree that that is so.

Mr. Oles: That is correct, the order of June 4, 1958, your Honor.

By Mr. Oles:

Q. Now, how many employees, apart from Mr. Welsch, did you have during the period of this strike who were members of the Teamsters' Union?

A. Two employees.

Q. And did they work during the period of the strike?

A. No, they didn't.

Q. Did you have any dispute with those employees?

A. None whatsoever.

Q. And did you pay them during the strike?

A. Yes, we did.

Q. Did the expenses of your company's operations go on [fol. 43] or not during the period of the strike?

A. Yes, all our expenses went on during the strike.

Q. Now, I think a moment ago you testified that you were unable to make deliveries during the strike, am I correct, except for those you made in your own car?

A. Yes, sir.

Q. Have you any idea how much in the way of deliveries you were able to do in your own cars?

A. Well, the ones that we made in our cars is just practically nothing. You can't load any more than four or five hundred pounds in the car, where the trucks deliver twenty thousand pounds at once.

Q. Now, following the termination of this strike the afternoon of June 4, what if anything did you do about making up deliveries that you hadn't been able to make?

A. We had to rush and work day and night and weekends for a few days in order to catch up with what business we had left.

Q. Did your employees work week ends?

A. I remember this, they worked nights. I can't recollect now if they worked Saturday or not.

Q. You pay overtime in connection with night work?

A. Yes, that is part of the contract.

Q. Did you do anything else regarding trucks in connection with this?

A. Yes, we had to rent extra trucks from truck rentals in order to catch up with our late shipments.

Q. What is the name of the truck rental?

A. Truck Rentals Incorporated.

Q. Now, did you get all your business back after the strike?

[fol. 44] Mr. Hoague: I object to the form of the question as leading.

Mr. Oles: I will reframe it.

The Court: Sustained. You may rephrase it.

By Mr. Oles:

Q. What if anything occurred to your customers following the strike?

A. We don't know exactly. We know for a fact that we lost some business. It is pretty hard to determine the loss of business. You could lose part of it, could lose half of it, or any percentage. I know for a fact we lost two good customers that we had in Tacoma, and we know that because they told us so. They didn't receive the flour so they went looking elsewhere for supplies.

Q. What are the names of those specific customers?

A. One is Jordan's Baking Company, affiliated with Langendorf, and the other was Moorhead Bakery, both in Tacoma.

Q. What is the nature of their business? Are they big or small?

A. Jordan's Baking Company is one of the largest in the area. They are wholesalers. They supply groceries, schools, hospitals, and so forth. They are wholesalers, and the other one is a retailer, where customers go in their front door and pick up their bread.

Q. That is Moorhead?

A. Moorhead.

Q. Did you lose all or part of their business?

A. Moorhead, I lost it all. Jordan's Baking Company, we lost the portion that we were unable to deliver at the [fol. 45] time; that is rye flour for their rye breads.

Q. Now, had you done business with Moorhead for quite a while or not?

A. Yes, done business approximately five, six years.

Q. How about Jordan's?

A. And Jordan's also, longer than that.

Q. And now, the rye part of your business with Jordan's, had you had that for quite a while or for a short time?

A. Not too long, since the first part of 1958.

Q. Tell me, how did you acquire this Jordan's business, Mr. Lucas?

A. I had to call this place for approximately five years before I was able to get this rye business from that place. It takes a long time. They just don't change overnight.

Q. Why don't they change overnight in your business, Mr. Lucas?

A. To my best ability, flour is a raw material to a bakery. It is just like aluminum or steel or something else to other industries. They usually buy from where they can get their best service. Until you can prove to them that you offer more than the other, they just won't change.

Q. I don't want to embarrass you with Pillsbury Flour Company or one of your other suppliers. Is there a certain similarity between flour products as raw material, Mr. Lucas?

A. Very little if there is any.

Q. Very little difference?

A. All bakery flours have to meet standards and it is [fol. 46] approximately all the same. Every company has the same flour, same type of flour.

Q. So the difference lies in what?

A. In mostly service.

Q. Has the business volume of the Lucas Flour Company been on the increase or decrease over the last several years?

A. Always been on the increase.

Q. Now, is that true of the first five months of 1958?

A. Yes, it is. It is very true.

Q. Was that an increase over the same period of the previous year?

A. Very good increase.

Q. Incidentally, is your business of a seasonal character at all?

A. To some extent. Like summer months are better than the winter months when picnics, people eat out more often and they buy more bakery goods. Summer months are a little better than winter months.

Q. Now, following the period of the picketing and strike here in question, what happened to the volume of your business?

A. All started decreasing about, started in June the same time we had the strike. The first time in years that our volume started decreasing and went below the previous months of the previous year.

Q. Now, how long did this decrease continue?

A. Up to date.

Q. Up to date?

A. As a matter of fact, last month I believe we showed a [fol. 47] little increase. We are getting close to the February of last year, so we hope that this month will be a little better.

Q. Now, Mr. Lucas, based upon your experience with this company and in this industry, would you state what your opinion is as to why business decreased after this strike?

Mr. Hoague: I object to this as not being a proper question for opinion evidence.

The Court: You are not basing the objection on the lack of qualifications, but that it is not an appropriate type of question of opinion of an expert?

Mr. Hoague: In a sense they are the same thing. I say this isn't a question that can be answered by an expert.

The Court: I can't figure out the basis of your objection. Is it because you challenge the qualifications of an expert or is this not the proper subject of expert opinion?

Mr. Hoague: I will say both.

The Court: Both?

Mr. Hoague: Both.

The Court: Objection overruled.

The Witness: The volume of business dropped because some of the accounts we couldn't deliver, others probably lost faith. Our reputation was ruined. They probably thought they couldn't depend on our deliveries.

Mr. Hoague: I object to any testimony as to probability. [fol. 48] The Court: The answer was substantially not responsive to the question. I will sustain it on that ground.

By Mr. Oles:

Q. Mr. Lucas, have you talked to a number of your customers since this strike?

A. Yes, I have talked to them, most of them.

Q. In the course of your business, do you see your customers?

A. Yes, every day of the week; that is why I know that we lost some of them, like the two accounts I mentioned prior.

Mr. Hoague: I object to this as being results of hearsay.

Mr. Oles: Not responsive.

The Court: Sustained.

By Mr. Oles:

Q. Now, Mr. Lucas, you know of two specific accounts which you lost?

A. Yes.

Q. Did the volume of that business account by itself for the decline in business?

A. No, it didn't.

Q. But you had a lesser volume in your other sales, is that correct?

A. Yes, sir.

Q. Can you pinpoint this loss to any particular customer?

A. Take for example, we had customers buying a thousand dollars a month for years. All of a sudden they are buying half of that. By not being able to deliver we left the door open to competition to get in and sell either all or [fol. 49] part of what we would be selling otherwise.

Q. Is it possible that people would buy part of their supplies from one supplier and part from another supplier, is that what you are talking about?

A. Yes, very possible.

Q. Is this common?

A. Yes, very common.

Q. And now let me go back to my question: What in your opinion is the reason why if this occurred, it did occur?

A. Yes, it did.

Q. Why?

A. They didn't depend on our deliveries for a while, so they looked for some other source of supplies.

Mr. Hoague: I object to that, your Honor, the answer. I thought there was going to be a different answer to the question. This obviously is speculative on his part. It is the result of possible hearsay and partly of just speculation.

Mr. Oles: Before the Court rules, may I make a comment at this point. There is of course one deficiency in the foundation we have laid for this kind of question, which I assure the Court will be filled, and that is the actual statistics that in the very necessity of things we have to have some witness come first. The treasurer will be on the stand and we will show the actual figures with which we are dealing. I am forced to ask Mr. Lucas as an officer of the company to give his opinion as to why the figures indicate this decline. Actually, I think he has more or less [fol. 50] done so at this point. As to speculation, we are dealing with an area of people's motive, people who are not parties to this suit. A vast number of reactions of three hundred purchasing accounts. There is no earthly way of taking a poll and finding out why they buy stone ground flour from General Mills and rye flour from Centennial and now only buy wheat flour from Lucas, or what have you. I think that in this instance, as I hope to show by appropriate cases, the Court has to take the best testimony that can be shown, that will be sufficiently good to indicate with reasonable certainty that there was a damage which is measurable in dollars. This is part of the foundation for that evidence that we are laying here.

Mr. Hoague: Well, just because it is difficult to take a poll of the customers doesn't mean that they can introduce evidence as to what his guess is as to the cause of the dropping off of business. We all know that in law practice or in business, if business drops off we have to scratch our heads very hard to find out why it is. This is just a speculative answer that he has made. I don't think it is testimony and ask it be stricken.

The Court: The Court intended to rule previously when this question was raised that the area is a proper area for expert opinion and that this witness met the requirements as an expert in this field and the Court regarded a previous question as in the nature of a hypothetical question based [fol. 51] on certain facts, some of which were missing from the record. The Court felt that the reason objection was not made to the question on that ground was the anticipation that Mr. Oles would fill in the missing facts to support the hypothetical. The Court thought it was attempting to rule on the basic principle, whether this was a proper field of expert questions. I want that to be clear because I have not been furnished any authority by either counsel as to whether or not this is a proper area for an expert opinion.

I am ruling, however, that it is because it appears to me the way this case has proceeded so far that that is a proper area. I will, however, invite authorities in the event the authorities would cause the Court to change its mind, the Court will have to then entertain a motion to strike to eliminate the opinion that has been expressed. There was something about this answer that just didn't exactly strike the Court right. I want the Court Reporter to read the answer back. I want to re-examine it. Would you read the answer to the hypothetical question? A part of the answer seemed to include positive assertions of facts which I did not intend to have as a part of opinion answer. It is difficult to evaluate and I don't know that it is worthwhile to stop.

Mr. Oles: I will stipulate on that if I can be helpful to the Court.

The Court: For the purpose of the Court's evaluation [fol. 52] it is the Court's intention and the Court's ruling

to exclude as not being responsive any portion of the answer which was offered for proof of the matter asserted in the statement rather than an opinion upon hypothetical facts given to this witness. Perhaps Mr. Oles might help the Court in the future in actually formally wording a hypothetical question and not letting him be placed in not answering the difference between an opinion answer or whether he is giving testimony.

Mr. Hoague: Your Honor, may I have a continuing objection to questions by the witness as to the cause of the drop-off in business?

The Court: Yes, you may have a continuing objection in that area.

Part of the problem is that the questions as they have been put, if the Court permitted him to answer, almost invite him to not also express an opinion, to also state the fact which should be the assumed fact. I think it would aid to clarify this thing and keep the legal issues so that we can correct it in the event we have made a mistake.

If you would put a hypothetical question to the witness.

Mr. Oles: Yes, your Honor. I am in this position, that actually I think the answer I have been looking for is in the record at this point, but I admit it is confused, but I was going to stop at this point.

The Court: I don't want to rule that your thoughts may [fol. 53] be correct or not, but that is something we may have to rule later. It is up to you; you will have to hazard the judgment whether you have asked this witness enough questions.

By Mr. Oles:

Q. Assuming that the evidence shows that the amount of business that you did with certain of your customers in the year 1958 showed a sharp decrease following the strike in all or in certain items which you formerly sold to these customers, have you an opinion as to why this decrease took place?

A. The only decrease would be a loss of business. We lose business and for the first time in many years.

Q. Have you an opinion as to why this occurred?

A. Because we were unable to deliver flour to our customers.

Q. During the period of the strike?

A. Yes, sir.

Q. Do you know of any other factors that could have or would have brought about such a decrease of business commencing on June 4, 1958?

A. No, that is a summer month and it should have been much larger than what it was.

Q. And is the statement you just made true or not true as to the other months in 1958, that followed June, July, August?

Mr. Hoague: I object to that as leading.

The Court: Sustained.

Mr. Oles: I will concede that is leading.

By Mr. Oles:

Q. Do you know of any other factors during the last half of 1958 which could have, or would have caused the [fol. 54] decrease in business?

Mr. Hoague: I object to that.

A. No, I don't.

Mr. Hoague: Object to that as leading.

The Court: Objection sustained.

By Mr. Oles:

Q. What factors if any existed in the latter half of 1958, Mr. Lucas, that would have or could have caused a decrease in your business?

A. No factors at all that caused decrease in business. As a matter of fact, in the last part of 1958 we added lines to our business, which they should have increased considerably.

Q. You added new lines?

A. For instance, shortening, which all the bakers use.

Q. Who in your company acts as salesman?

A. All three officers, John Lucas, myself, and Peter Conom.

Q. And that is all?

A. That is all. And the office secretary takes orders by phone; of course, it is just taking orders, it is not selling.

Q. Were all these personnel active during the last half of 1958?

A. Yes, sir. No vacations.

Q. No vacations at all?

A. No, tried to bring the volume up to where it was before.

Q. Now, did you normally take vacations in the summer?

A. Yes.

Q. How about prices, did they go down during this period? Was there a decline in price?

[fol. 55] A. No.

Q. Was there an increase?

Mr. Hoague: I object to the leading question.

The Court: Sustained.

By Mr. Oles:

Q. Were there any increases or decreases in prices?

A. No change that I can recollect.

Mr. Oles: I have no further questions.

Cross examination.

By Mr. Hoague:

Q. Mr. Lucas, do you remember testifying at the arbitration hearing?

A. Yes.

Q. And do you remember the chairman, Harry Margolis, asked you some questions?

A. Yes, I remember him asking questions.

Q. Isn't it a fact that he asked you with reference to Mr. Welsch,

"About when did you fire him?"

And that you answered:

"We fired him when he showed up in the morning, Tuesday, the 27th."

Isn't that your answer?

A. I don't remember.

Q. You don't remember whether you did or didn't say that?

A. I don't remember the date I gave. I remember that I said we fired him.

Q. Do you deny that you said that?

A. No, I don't deny I said it. I don't remember the [fol. 56] date, I don't remember.

Mr. Oles: It might be appropriate if you, by way of foundation, Mr. Hoague, were to ask him when this question and answer occurred, and I will object to further questioning unless you include that.

Mr. Hoague: This was on September 11, 1958.

By Mr. Hoague:

Q. Is that correct? It says September 11, 1958.

A. I can't remember the date.

Q. That sounds as the proper date?

A. Approximately that time, September.

Q. I show you on page 48 here—

Mr. Oles: We will stipulate that the record so indicates, the question, and indicates the answer.

Mr. Hoague: That he did answer:

"We fired him when he showed up in the morning, Tuesday, the 27th."

The Witness: It was something else said prior to that. Mr. Margolis asked me how could you fire a man if you hadn't seen him, and that is why I said the first time I saw him was the morning of the 27th.

By Mr. Hoague:

Q. And that is correct?

A. Yes.

Q. And you were the person who fired him, personally?

A. Yes, sir.

Q. Did you hear Mr. Matula ask the employees to leave the plant on the 27th of May?

A. Yes.

Q. Where was he?

[fol. 57] A. He was in the entrance of the place.

Q. Entrance?

A. Inside. in the hall leading to the warehouse.

Q. And what did he say to them?

A. He asked them to come out.

Q. What did he say, as best you remember?

A. Oh, he asked two men that were in there "Please come outside."

Q. That is all he said?

A. Yes, sir.

Q. Nothing else you heard him say?

A. No, I only asked the men later on, "What are you doing out here?"

Q. You didn't hear him, Nick Matula, say anything?

A. No, I didn't hear him saying anything else to the men at that time.

Q. Where did you say that they parked the cars, a car with a banner on it?

A. Two cars.

Q. Two cars. Well, a good deal of the time, actually there was just one car there?

A. When one was going to lunch.

Q. At all times there were two cars?

A. Yes, sir.

Q. You mean from May 27th until June 4th, during the daytime there was always two?

A. Was always Jack Welsch and one more man; he had a Chevrolet station wagon.

Q. Do you remember any of the other cars?

A. Mr. Welsch's was a Plymouth.

[fol. 58] Q. And how many banners?

A. One in the front.

Q. One banner?

A. In the front of the engine.

Q. In front of one of the cars?

A. Both cars.

Q. Each car had a banner?

A. Yes.

Q. And where were those cars parked?

A. They were parked alongside of our warehouse.

Q. They were parked across the railroad tracks, isn't that correct?

A. Yes.

Q. Not on your property?

A. Well, that is railroad property where the tracks are. We don't own the property.

Q. They weren't parked on the railroad tracks?

A. No, alongside of the railroad tracks. Sometimes the Chevrolet station wagon was parked right on the tracks. You see, there is cars coming through there, unless they come to unload, to bring cars to us.

Q. And the picket sat in the car for the most time?

A. Except when he wanted to talk; like the railroad engineer and some truck drivers that attempted to deliver to us.

Q. Didn't they sometimes get out of the car and talk to somebody?

A. When somebody stopped in front of our place with a truck they would get off the car and come and talk to them. What they said to them, we couldn't hear.

[fol. 59] Q. I wonder if you could give the Court some idea as to the physical setup there. Isn't it correct to say that your warehouse faces on Homer Street?

A. The entrance.

Q. The entrance is on Homer Street and then on the westerly boundary of your property are the railroad tracks, isn't that right?

A. Yes.

Q. And to get to your plant you come from—what is that street that runs out the main highway there?

A. Airport Way.

Q. You come from Airport Way and go west down Homer Street?

A. Yes.

Q. And so that you wouldn't pass these picketing automobiles coming to your plant, would you, until you got down to the far end?

A. There is another way of coming in. The only way is not from Airport Way.

Q. That is the usual way, though, isn't it?

A. No, it isn't, because the corner of Airport Way and Homer is so sharp that no truck can turn unless it is coming out, but not coming in. It is very narrow, 20-foot street, just 20 feet wide, and the trucks have a hard time. So they usually come in from the other side, and that is the only way they can back in to the unloading platform.

Q. Was there any other occasion, other than the one time that Rus Anderson followed you, that you were followed at all by any of the picketers?

A. Yes, I was followed another time by Mr. Anderson.

[fol. 60] Q. Twice?

A. Yes.

Q. When was that?

A. When the pickets started, in order to put this flour in our cars, I drove our truck. I wanted to take our truck from the loading platform and park it some place. Two blocks away is the sugar company that we sell sugar, Amalgamated Sugar Company. I drove our truck to park it there in their big yard because they have a large fenced yard. And Mr. Anderson followed me there.

Q. When was that?

A. That was May 27th.

Q. Both of these instances of following were May 27?

A. Yes, sir.

Q. Except for May 27, you never were followed?

A. We were followed by another person later on.

Q. All right. Tell us about that. Who was he?

A. We don't know his name. He followed the other officer, Peter Conom, from the company. You see, there was two men. One was staying always there, and if no third person was there, the second man used to follow us. What we did, all three of us took out the same time so all they could do is follow one. So Mr. Conom was followed. Those are the facts.

Mr. Oles: You might shorten this a little if I advise you that Mr. Conom will take the stand and testify.

The Court: At this time we will recess until 1:30.

(Noon Recess.)

[fol. 61] AFTERNOON SESSION

Monday, March 16, 1959
1:30 o'clock P.M.

Mr. Oles: Mr. Lucas, will you resume the stand.

NICK LUCAS, resumed the stand and testified further as follows:

Cross examination (Cont'd).

By Mr. Hoague:

Q. You are Nick Lucas?
A. Yes, sir.
Q. It is true that there has been an increase in the tendency in recent times for flour mills to sell directly to bakeries, isn't that so?
A. Well,—
Q. Rather than going through jobbers?
A. No, as a matter of fact, the company we represent is the only company here that is operating through jobbers and they haven't tried to go direct.
Q. They have been trying?
A. No, all the rest of the companies operate direct in this state.
Q. How long has that been going on?
A. Twenty-five, thirty years.
Q. As long as that?
A. As far as I know. I have been around that long.
Q. Isn't it true that more and more are selling direct?
A. No, going the opposite way. As a matter of fact, I [fol. 62] heard about two or three weeks ago from the branch manager from California that even in Minneapolis where all the mills are established right there, they are going to go through jobbers because the cost of operation is so high. We had another competitor started three years ago, Montana Flour Mills, and they started through jobbers and they are new. So I don't see that that is true.

Mr. Hoague: No further questions.

Redirect examination.

By Mr. Oles:

Q. Mr. Lucas, would you tell us now your explanation of the exact date of the firing of Melvin K. Welsch?

Mr. Hoague: Just a moment.

Mr. Oles: I would like to make this comment. This is not intended to fly in the face of the Court's ruling and I don't want the Court to feel that I am doing this to wave a red flag. It is our contention that the cross examination has sought to impeach Mr. Lucas on this issue, and the purpose of this testimony is not to challenge the record of arbitration, but to rehabilitate the testimony of the witness and for no other purpose.

The Court: For that purpose, you may proceed.

Mr. Oles: Go ahead, Mr. Lucas.

A. Actually, Mr. Welsch was discharged May 26th and the first time I saw him was May 27th, since he had been off work, and I discharged him personally, told him that. Mr. Welsch knew about this discharge because he was at [fol. 63] the Union offices and I already told Mr. Rus Anderson over the phone that he was discharged and we would not rehire Mr. Welsch. That is when he said, "I am coming down tomorrow morning." That was May 26. He was coming down May 27. And I asked him what he was going to do down here and he said, "To tie up your joint." That is the exact words. So I told Mr. Rus Anderson that Mr. Welsch was discharged. That was the purpose of him coming down.

Mr. Oles: That is all.

Mr. Hoague: No questions.

Mr. Oles: You may step down, Mr. Lucas.

(Witness Excused.)

Mr. Oles: I would now like to publish a deposition, two depositions that are on file herein, I believe, and I think there are only two.

The Clerk: Yes, depositions of Richard Baker and Dale Moorhead.

The Court: Any objection?

Mr. Hoague: No objection.

The Court: They will be published.

Mr. Oles: With the Court's permission, I would like to first take the deposition of Mr. Moorhead and then the deposition of Mr. Baker.

Mr. MacDonald: You want me to answer? Do you mind me answering, Mr. Oles?

Mr. Oles: I would be delighted to have you answer, Mr. MacDonald.

The Court: With the approval of Counsel, I will excuse [fol. 64] the Court Reporter from reporting the depositions as read. If you do make an objection, alert the Reporter to the page and line.

This is a deposition taken March 11, 1959, in Tacoma, Washington, by notice and subpoena at the instance of the attorneys for the defendant in this cause, and the direct examination is by Mr. Hoague.

(Whereupon, the deposition of Dale Moorhead was read as follows:)

"DALE MOORHEAD, having been first duly sworn by the Notary, deposed and testified as follows:

Direct examination.

By Mr. Hoague:

Q. Will you give your full name?
A. Dale Moorhead.
Q. No middle initial?
A. No middle name.
Q. Is that M-o-o-r-e-h-e-a-d?
A. No, M-o-o-r-h-e-a-d.
Q. What is your home address, Mr. Moorhead?
A. 2908 South 10th Street.
Q. Now, what is your occupation?
A. Baker.
Q. What bakery are you connected with?
A. I have my own retail shop.

Q. Retail shop. You do the baking for that shop?
A. Yes.
Q. Where is it located?
[fol. 65] A. 2913 South 12th Street.
Q. Now, you are here pursuant to subpoena that was served on you?
A. Yes, I am.
Q. Do you have the records of your purchases from Lucas Flour Company?
A. Here's '58. That's for the first part of '58.

(Off-the-record discussion.)

Q. How long have you been purchasing from Lucas Flour Company, Mr. Moorhead?
A. Well, started steadily in 1956.
Q. And—
A. Seems like it was about January the 13th, 1956, as a steady buyer, it looks like.
Q. Did you buy all of your flour from them?
A. Yes, I was starting with the 13th of January of '56.
Q. Now, I notice from this sheet that was supplied me by Lucas Flour Company that there was no purchase from February until May. Does that accord with your records?
A. What year are you in?
Q. 1958.
A. From February until May?
Q. Yes.
A. Well, let's take a look here. Well, here's January, February—here's March.
Q. March 4th there was a purchase?
A. And here is March the 17th for 50 some sacks.

Mr. Oles: I don't think you properly interpret the records I gave you, Mr. Hoague.
Mr. Hoague: I see, that is a '3'.

[fol. 66] A. It's very possible that one month would be skipped if a purchase was made at the end of one particular month; it might miss the next month and fall on the first of the month following, the way I purchased it.

Q. What is your next purchase after the one of March 17th, 1958?

A. March—well, here's one May the 5th.

Q. Yes, was that the next one?

A. Yes.

Q. So there wouldn't have been any purchase—

A. That was one of those incidents where I just told you about, where I skipped a month. The month of April was omitted.

Q. Now, in the month of—the latter part of the month of May and the early part of June, 1958, Mr. Moorhead, were you aware that there was labor trouble—

A. No.

Q. —with Lucas?

A. No, I wasn't.

Q. When were you first notified that there was any labor trouble?

A. Well, let me see here. On the 4th of June I had to go to the trouble to stop work and go out and pick up a sack of flour which was ordered the week prior for which —I don't know why it didn't come; it was supposed to have been delivered, but the week following the 4th of June, Mr. Lucas came in and he said, 'I have your sack of flour in the station wagon in the alley if you want it.' 'Well,' I says, 'You take your flour and do as you please with it. I don't [fol. 67] want it.' 'Well,' he says, 'I had a feeling that this was going to happen; but,' he says, 'I couldn't do anything about it because our warehouse was tied up.' And he says, 'It's just now that I have been able to get you your sack of flour.' And if I had of still been waiting, why, I would have been partially out of business, so to speak, if I had been still waiting for that sack of flour.

Q. Had he notified you that he wasn't able to deliver, what difference would that have made to you?

A. Well, that is hard to say. I—that's one of those theoretical questions.

Q. All right, why aren't you dealing with Lucas now?

A. Well, I would say for that reason; the flour business is a funny business. As long as price is right and product is right and service is right, you go on month after month after month buying it until something happens; and then

you, you switch, getting the same grade product and so on and so forth; and then you will go on with that man until either there is a considerable price differential or something goes wrong with the service or the product doesn't happen to stand up to what it's supposed to.

Q. Yes. I am not allowed to lead you, you see, in questions. That is why I ask these in sort of awkward fashion.

A. I realize that; that's all right; that's all right.

Q. And again I would like to ask you why is it that you stopped dealing with Lucas?

A. Well, I became very disturbed over the fact of the way [fol. 68] I got fouled up on that flour deal; I mean, I am self-employed and my shop depends on my own production; and it just so happened that this one particular sack of flour—that I finally just had to close up shop, not the store part, but the manufacturing end of it, and get down to General Mills at Sperry Dock and pick up a sack. And the red tape on these pick-ups at some of these big mills is maddening enough without having to do it under trying circumstances.

Q. Did you state the exact date that you first found out that there was—

A. Well, as close as I could tell you it would be the Wednesday following the 4th day of June; now, just what that date would be I wouldn't be able to say without a calendar, because Mr. Lucas made his calls on Wednesday and his deliveries were on Friday or Monday depending upon his truck setup.

Q. June 4th was a Wednesday?

A. Well, that was the day I picked it up.

Q. That was the day you picked it up?

A. According to this deal here.

Q. And neither he or anybody else notified you that there would be a delay then?

A. No, no, I didn't know anything about it until the following week.

Mr. Hoague: No further questions.

Cross examination.

By Mr. Oles:

Q. In other words, if I may ask the question, Mr. Moor-
[fol. 69] head, am I correct in stating that it was this incident of the failure to deliver the flour on time which is the basic reason why you terminated your relationship with Lucas Flour Company?

A. Yes, I would say that.

Mr. Oles: Thank you.

Redirect examination.

By Mr. Hoague:

Q. If he had called you up on May 27th and said, 'We are tied up. I won't be able to make deliveries for a while,' what effect would that have had on your patronage of Lucas Flour Company?

A. Well, it is possible if by calling me early enough and giving me time enough that I could have gone at my own convenience and corrected my shortage until he could have taken care of it otherwise, why—well, it's possible that everything being equal, product, service, price, that I would still be purchasing.

Q. One other thing, you weren't under contract with him; you bought from day to day?

A. Well, no, I contracted every year, but my contract had expired.

Q. When did it expire; do you remember?

A. Oh, that would—I would say approximately in April. I was usually contacted in the latter part of July or sometime during August, and you run for 120 to 150 days on contract; that is more or less the off season, so to speak.

Mr. Hoague: Will you waive signature?

[fol. 70] The Witness: I will waive signature.

Mr. Oles: We will waive signature."

Mr. Oles: We now turn to the deposition of Richard Baker taken at the same time and place and under the same circumstances as the deposition just read of Mr. Moorhead.

"RICHARD BAKER, having been first duly sworn by the Notary, deposed and testified as follows:

Direct examination.

By Mr. Hoague:

Q. Your name is Richard Baker?
A. Yes.
Q. Do you have a middle initial?
A. 'F'.
Q. Richard F. Baker. And what is your home address?
A. 2801 Cheyenne.
Q. Tacoma?
A. Yes, sir.
Q. Now, what is your occupation?
A. I am office manager for Jordan Baking Company, division of Langendorf United Bakeries.
Q. What was it a division of?
A. Langendorf.
Q. Geographically, how wide a territory does Langendorf cover?
A. Langendorf covers the whole coast.
[fol. 71] Q. The whole west coast?
A. Yes, sir.
Q. Now, does Jordan Baking Company do its own purchasing separately or does Langendorf do its purchasing for it?
A. In some respects Jordan does it and in other respects the home office does it. In minor items such as rye flour and, oh, certain items that aren't too heavily used Jordan controls their own purchasing.
Q. By the way, how long have you been office manager?
A. I have been office manager for Jordan since August 26, 1957.
Q. As to the more commonly used items like white flour, who does the purchasing?
A. White flour, the purchasing is done through the home office.
Q. Of Langendorf?
A. Of Langendorf, yes, sir.

Q. Now, you are here pursuant to a subpoena that was served on you?

A. Yes, sir.

Q. And that asked you to bring some records with you. Do you have them?

A. Yes, sir. May I make a statement now that the subpoena had a notation in it that I was to bring the records for Moorhead Bakery, concerning purchases by Moorhead Bakery. I have no connection at all with that.

Q. You have no connection. Do you have the records of the purchases from Lucas Flour Company from '56 to the present date?

A. Yes, sir.

[fol. 72] Q. And are those records that you are handing me, are they kept in the regular course of business?

A. Yes, sir, they are.

Q. And they are under your custody?

A. Yes, sir. This is the first year, and that year you have there is the current year; and this is the year 1956. (Indicating records.) You have the year 1958 to '59, and this is the year '57 to '58. We are set up on a fiscal year basis from July the 1st through June the 30th; and the only records I have brought here are the records concerning the purchases of rye flour which are the flours that are in question in this action.

Q. Did you purchase any other flour from Lucas?

A. Yes, sir, we buy stone ground flour from Lucas; and we still are.

Q. You are still buying stone ground flour?

A. Yes.

Q. And the rye flour is the only thing that has been discontinued?

A. Yes, sir, to my knowledge that is all.

(Off-the-record discussion.)

Q. Now, showing you this Hof-dark rye flour—

A. Yes, sir.

Q. The earliest purchase shown on this ledger is December 20th?

A. May I make comments? This is the inventory that we had on hand as of December 28th, 1958. On January the 12th we purchased five bags of this Hoffmueller.

Q. January 12th what; 19—

A. 1959; which cost us $23.25.

[fol. 73] Q. Then you are purchasing Hof-dark rye flour from Lucas?

A. No, sir, that is a purchase from General Mills.

Q. That is from General Mills?

A. Yes, sir; if you—if you will notice that on this card here, I have purchases marked; the 'G' stands for General Mills, and the 'L' stands for Lucas.

Q. That is on the left-hand column?

A. Yes, sir, on the left-hand column. That is for the period from December 27th—December 29th, 1957, through June 25th of 1958; but I have each individual one marked with the 'G' or 'L'.

Q. All of your purchases in 1959 have been from General Mills?

A. Yes, sir.

Q. Is that under a contract that you have with General Mills?

A. Yes, sir, here is our contract covering that. It calls for purchase of 200 sacks of Triple Aught flour and 150 sacks of Hoffmueller flour.

Q. How often?

A. As required; it's just actually—that is the total amount we have purchased or have signed up for on the contract, and we draw it out in lots of five or ten sacks.

Q. This contract that you have with General Mills covers how long a period?

A. Until this quantity is purchased.

Q. And drawn?

A. And it's drawn, yes, sir.

Q. All right; now, back to the Hof-dark rye flour; the [fol. 74] purchases from July 2nd, 1958, to the present date were from whom?

A. From General Mills. This is the card that precedes the one you were just looking at.

Q. Now, you purchased Hof-dark rye flour from Lucas Flour Company from February 17th through June 2nd; is that correct?

A. Yes, sir, with the exception of the one order in here on April the 2nd.

Q. Of '58?

A. Yes, sir.

Q. Before February 17th where did you purchase your Hof-dark?

A. From General Mills.

Q. From General Mills?

A. Yes, sir.

Q. And when did you start?

A. As far as our records as Jordan Baking Company, a division of Langendorf, goes, they were purchased from General Mills prior to that time.

Q. In other words, the only time you purchased Hof-dark rye flour from Lucas Flour Company was from February 17th, 1958 through June 2nd, 1958; is that correct?

A. Yes, sir, to the best of my knowledge.

Q. On June 4th, 1958, you made your first purchase from General Mills—

A. Yes.

Q. —after Lucas. Now, turning to Rye-Zero-Zero-Zero flour—is that what you call it?

A. Yes, Rye Triple Aught.

Q. Rye Triple Aught. Where did you purchase this flour [fol. 75] before February 17th, 1958?

A. General Mills.

Q. And that is as far back as your records go?

A. Yes, sir.

Q. Which is how many years?

A. That is just to the time that Langendorf purchased Jordan Baking Company, which would be September of 1956.

Q. And you started purchasing from Lucas February 17th, and with the exception of one purchase of 500 pounds on April 2nd, 1958, you purchased from Lucas right through June 2, 1958?

A. Yes, sir.

Q. And since June 2, you have purchased only from General Mills?

A. Yes, sir.

Q. Why did you shift from General Mills to Lucas?

A. That is beyond my realm of knowledge. I am the office manager and the purchasing is done by Mr. Tosic, the plant

manager, and he has control. I could state what I have heard, but that would—I don't know whether it would be acceptable to you or not.

(Off-the-record discussion.)

Mr. Oles: I wish to state for the record that Lucas Flour Company is, of course, not making any objection to the question that is being presented to the witness; and if it's hearsay, we are not making that objection and will not make it at trial.

Q. Had you had any delivery difficulties with Lucas?

A. I believe there had been one other time that there had been partial delivery or something come down; not the full [fol. 76] delivery; in looking at my records here I find that on March the 26th there was a single bag delivery; then on March the 28th there was seven bags delivered; and that to me does not sound like it would be the way things would normally be purchased. We would be in multiples of five or ten bags at a time; therefore, it looks to me like we had run short prior and—but whether that is the case or not, I don't know; just looking at my records here; that's all I can go by.

Q. All right; from hearsay will you state why you discontinued buying from Lucas?

A. My understanding is that the delivery, the final delivery we got from Lucas was late in arriving and thereby created the confusion of throwing our schedule of baking and whatnot off. Therefore, we have to have our flour delivered when we want it so that we won't have those problems developing.

Q. Now, was any notification given to your company that there would be a late delivery?

A. To my knowledge, no, although it could have been given to somebody other than myself; but to my knowledge, no.

Q. Well, didn't Mr. Tosic tell you that this was one of the things that burned him up?

Mr. Oles: I object to the question in that form. It's leading and suggestive.

Mr. Hoague: It is leading and suggestive. I withdraw the question and ask you:

Q. What did Mr. Tosic say about notification from Lucas?"

Mr. Oles: On page 10, line 7, I made an objection which [fol. 77] I now withdraw.

"Q. What, if anything, did Mr. Tosic say with reference to whether or not Lucas notified them that there would be a late delivery?

Mr. Oles: I am making a continuing objection.

Q. You answer that.

A. I will answer that?

Q. Yes.

A. As far as I can remember, there was no specific statement made as to no notification of delivery; the problem and irritation came from the fact the flour was late; whether we had been notified the flour was going to be late—however, had we been notified we possibly could have picked it up from some other person before we got as low as we were; but as far as the fact of notification, I don't believe that there was a specific reference made to that, as I recall it now.

Q. Did you have a contract with Lucas Flour Company?

A. No, sir, we did not have a contract with Lucas Flour Company. We ordered it from time to time as needed, giving a separate order each time.

Q. And the price would rise or fall as the market price would fall—

A. Yes, there would be fluctuation in price.

Q. You still are buying certain products from Lucas Flour?

A. Yes, sir.

Q. What products are you buying?

A. Stone ground wheat flour.

Q. Do you have the volume of stone ground that you buy [fol. 78] from them?

A. No, sir, I don't; not right in my—I could get it very shortly, but I haven't got it right now.

Q. Any other products from Lucas Flour?

A. No, sir.

Q. What effect did the picketing of Lucas Flour Company have on your purchasing from Lucas?

A. At the time of the picketing, I do not know whether we even knew Lucas was picketed; however, if that was the cause of that final delivery as we have found out since, that—the statements have been made that that is the cause of the late delivery; that was very irritating to Mr. Tosic, and to the plant production man; I have been told since the time of this changeover that that was when the picketing was.

Q. What sort of business does Jordan Baking Company do?

A. We make bread, sweet goods, and sell them on the wholesale market.

Q. Covering how large a territory?

A. We sell in Bremerton and the surrounding area, Tacoma and the surrounding area, Olympia and Aberdeen.

Mr. Hoague: All right; that's all the questions I have. Do you want to ask some?

Mr. Oles: There have been certain records referred to here. I wonder if they could be marked by the Court Reporter."

Mr. Oles: To complete the record at this point, on page 12 of the deposition, Exhibits 1 and 2 were marked by the Court Reporter who took this deposition and I would be [fol. 79] grateful if the Clerk would now mark those two exhibits.

(Ledger sheets were marked Plaintiff's Exhibits Nos. 2 and 3, respectively, for identification.)

The Court: Now, which one was Plaintiff's 2 in the deposition of Baker?

Mr. Oles: I have now had the Clerk mark in this case Plaintiff's Exhibit 2 that which is referred to as Exhibit 1 in the deposition of Mr. Baker.

The Court: Thank you.

Mr. Oles: I have also had the Clerk mark as Plaintiff's Exhibit 3 in this case an exhibit which was marked as Plaintiff's 2 in the deposition of Mr. Baker.

The Court: Thank you.

Mr. Oles: And at this time let us proceed with the examination in the deposition. I am continuing the deposition now.

"Mr. Oles: We will stipulate that copies of these exhibits may be substituted for the originals.

Mr. Hoague: Thank you.

Cross examination.

By Mr. Oles:

Q. Now, Mr. Baker, handing you what has been marked for identification as Plaintiff's Exhibit No. 1, this pertains to the Hof-dark rye flour, does it not?

A. Yes, sir.

Q. And what has been marked for identification as Exhibit No. 2 relates to the other type which you have described as Triple Aught rye flour; is that correct?

[fol. 80] A. Yes, sir.

Q. Thank you. Now, from examining these records, can you tell when that last shipment to which you refer was ordered?

A. Not by referring to these specific records; however, by referring to the Voucher Number 4-410, which appears on the reference column, I can find my copy of the original purchase order, which has the date of May 21st, '58, on it.

Q. May 21st, 1958. Now, from records before you, can you determine when the flour order under that date was in fact delivered?

A. It was in fact delivered on June the 2nd, 1958, as shown by my receiving record attached to the same voucher.

Mr. Oles: Now, at this point, Mr. Hoague, will you stipulate that you will not raise the question of best evidence at trial as to the questions and answers just received as to date of order and date of delivery?

Mr. Hoague: Yes, I won't raise it.

Mr. Oles: You won't raise that issue. Otherwise, of course, we would have to rob some more of his files and put them in the record.

Mr. Hoague: Yes.

Mr. Oles: Thank you; I have no further questions.
The Witness: I will waive signature.

(Witness Excused.)"

[fol. 81] OFFERS IN EVIDENCE

Mr. Oles: We at this time offer what has been marked for identification as Exhibits 2 and 3.
Mr. Hoague: No objection.
The Court: Admitted.

(Whereupon, Plaintiff's Exhibits Nos. 2 and 3 for identification were admitted in evidence.)

Mr. Oles: I would like to have, if the Court would kindly permit me, a few minutes for a phone call. My office has indicated that there is a matter which they urgently wish me to call upon.
The Court: We will take time for you.
Mr. Oles: Thank you very much.

(5-minute recess.)

Mr. Oles: I would like to call as my next witness Mr. John Lucas.

JOHN LUCAS, called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Oles:

Q. Would you kindly state your name and address?
A. Home address?
Q. Yes, sir.
A. John Lucas, 2645 West Boston.
Q. Now, what is your occupation, sir?
A. I am president of the Lucas Flour Company.
Q. Mr. Lucas, how long have you been in the flour business?
A. To be correct, 35 years next October.

Q. Where?

[fol. 82] A. In Seattle.

Q. Mr. Lucas, was there any decline in your business following this strike on May 27 to June 4, 1958?

Mr. Hoague: I object to the form of the question being completely leading.

The Court: Sustained.

By Mr. Oles:

Q. What if anything occurred to the volume of your business, Mr. Lucas, following the events of May 27 to June 4, 1958?

A. We did get hurt quite a bit by reputation and also business.

Q. Mr. Lucas, have you been in business during most of that period under the name of Lucas Flour Company?

A. Yes, sir.

Q. And do you have few or many customers?

A. Oh, we have between 250 to 300 customers.

Q. And have you any personal familiarity with these customers?

A. Yes, we have.

Q. Now, Mr. Lucas, have you any opinion as to the cause of this injury to your business to which you have testified a moment ago?

A. Yes, on account of the strike.

Mr. Hoague: I want to renew my objection to this question; same objection that I had to Mr. Nick Lucas.

The Court: You are not challenging his ability as an expert in the field?

Mr. Hoague: It seems to me that this is the reverse side of the same problem. One is that it is not a subject [fol. 83] for expert testimony and therefore, if I am correct, he couldn't be an expert.

The Court: Objection overruled. I would like to see if you can avoid the trouble that I felt existed the last time. We tried to put a hypothetical question to a witness by having you state a hypothetical fact in the assumption you would fill in the missing gaps by subsequent testimony.

Mr. Oles: I will do that now.

By Mr. Oles:

Q. Assuming, Mr. Lucas, that there was a decline in the gross volume, the gross sales of your business following this strike of last year, what is your opinion as to the cause of that?

A. Well, we do do a lot of shipping clear up to North Dakota, Montana, and all through there, certain flours, where they can't get them up there. With this strike coming we had some orders and we had to hold them. We couldn't ship them. So those people went out and bought from somebody else and that way it hurt us.

Q. On what do you base your opinion, Mr. Lucas?

A. Well, on account they can't get the service clear back there and they start to buying from somebody else and they continued to buy.

Q. Have you had any personal contact with some of these customers of yours since the strike?

A. Yes, some of them. But they start to buy from somebody else and the service is better and just as good, they continue in buying.

Q. As president of this company, do you contact customers yourself?

[fol. 84] A. Yes, I do. I've got a route of my own.

Q. You have a what?

A. A route for contacting. I have certain customers I call on them.

Mr. Oles: That is all.

Cross examination.

By Mr. Hoague:

Q. Mr. Lucas, you remember when I was down at your plant you very kindly showed and gave me certain information; you remember you said the only customers that you knew that discontinued as a result of the picketing was the Jordan Baking Company and Moorhead Bakery?

A. We are talking about them at that time. We didn't talk about somebody else.

Q. I beg your pardon?

A. We didn't talk about other companies; we just talked about Jordan Baking Company and Moorhead.

Q. Don't you remember I asked you what accounts you had lost and you said the only ones that you knew that you had lost were Jordan and Moorhead, isn't that correct?

A. I don't know, I don't remember telling you that. I know we lost lots of them.

Q. Do you now deny that you said that the only ones that you knew you lost—

A. I do deny it because I don't think I told you that.

Mr. Hoague: No further questions.

Mr. Oles: That is all. You may step down, Mr. Lucas. May Mr. John Lucas be excused?

[fol. 85] The Court: Any objection?

Mr. Hoague: No objections.

The Court: He is excused.

(Witness Excused.)

Mr. Oles: I am in a rather difficult position, your Honor. I had certain exhibits that were to be introduced in connection with the testimony of the next witness which were to be prepared and submitted and somehow my office has managed to mislay them. We can go a certain distance with this next witness, in fact a long way, but I am going to reach a point where I am either going to have to recall him or what, I don't know. If I proceed to try and utilize to the fullest the time I would like to ask the Court whenever we reach the point where we are going to stop, I am going to have to ask the Court for a continuance until tomorrow morning.

I realize this is a great imposition, but I can only—I don't have any idea what happened to the exhibits up there, but some of them got mislaid or lost or untyped.

The Court: Let's proceed on. We will be realistic. We will proceed on. We can make better use of the time in chambers than we can otherwise. When you get to the point where you need to advise the Court that you would like to recess, we will evaluate your request at the time.

Mr. Oles: We will call Mr. Conom now.

[fol. 86] PETER CONOM, called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Oles:

Q. Would you please state your name and home address?

A. Peter Conom, 3601 36th Avenue West, Seattle.

Q. And what is your occupation, sir?

A. I am a salesman.

Q. And do you have any official position with the plaintiff?

A. Yes, I am the secretary-treasurer of the Lucas Flour Company.

Q. How long have you been associated with Lucas Flour Company?

A. With the exception of a few months in the service, twelve years.

Q. What are your duties with the company, Mr. Conom?

A. I act as a representative to the trade in direct contact with selling, that is, and other than that I have duties in the office. I do all the paying of bills, I do a certain amount of purchasing.

Q. Do you keep or have you in your custody the books and records of the accounts of this corporation?

A. Yes, sir, I do.

Q. Are these books and records audited or examined by any accountant?

A. Yes, we have a licensed public accountant.

Q. And how often is that done?

A. They are checked every month with periodic quarterly [fol. 87] statements and final statements every quarter and final statements at the end of the year.

Q. Physically where are these records kept?

A. At our offices at 929 Homer Street.

Q. Are they kept in your custody?

A. Yes, sir, they are.

(Income Summary Sheet marked Plaintiff's Exhibit No. 4 for identification;

(Profit & Loss Statement marked Plaintiff's Exhibit No. 5 for identification;

(Statement marked Plaintiff's Exhibit No. 6 for identification.)

By Mr. Oles:

Q. Handing you first what has been marked Plaintiff's Exhibit 4, Mr. Conom, what is that?

A. This is an income summary for the period of January 1st to December 31st, 1957, of the Lucas Flour Company.

Q. Is that prepared from the books and records in your custody?

A. Yes, sir, it is.

Q. Is it or is it not true and correct, as far as you know?

A. To the best of my knowledge, this is a correct statement, yes.

Q. Handing you what has been marked as Exhibit for identification No. 5, what is that?

A. A statement of profit and loss for the Lucas Flour Company from January 1st to December 31st, 1958.

Q. And that is similar to Exhibit 4, but for 1958 rather than for 1957?

A. Yes, it is.

Q. And is your testimony regarding that the same with [fol. 88] regard to Exhibit 4?

A. Yes, it is.

Offers in Evidence

Mr. Oles: We offer 4 and 5, your Honor, at this stage primarily as background. They are essentially profit and loss statements for the years 1957 and for 1958, of the Lucas Flour Company.

The Court: Any objection?

Mr. Hoague: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibits No. 4 and 5 for identification were received in evidence.)

Mr. Oles: I have copies here for the convenience of the Court and I have provided a copy of each to Counsel.

By Mr. Oles:

Q. Handing you now what is marked for identification as Plaintiff's Exhibit No. 6, what is that, Mr. Conom?

A. This is a sales analysis in respect to 1956, '57, '58, and the first two months of 1959. It is a percentage of increases from year to year, 1957 in relation to 1956, and 1958 in relation to 1957, and the first two months of 1959 in relation to the first two months of 1958.

Mr. Oles: I wonder, if Counsel had no objection, I would like to provide the Court with a copy of this so he can follow the explanation.

By Mr. Oles:

Q. Now, so that we understand this proposed Exhibit 6, Mr. Conom, on the left-hand column are the lists of the months of the years, is that correct?

A. Yes, sir.

[fol. 89] Q. And then comes a column headed 1956. What are the figures there?

A. These are the exact figures taken from the sales journal for the period of each month in 1956.

Q. Those are gross sales?

A. Yes, sir, they are.

Q. Now, the next column is entitled 1957, and that shows figures. What are those?

A. Those are identical sales figures taken from the sales journal for the months from January to December, 1957.

Q. Now, the next column is entitled "Increase over previous year". What are those figures?

A. Those figures are analysis based on 1956 figures as compared to 1957; the relative increase per month of business volume sales over the previous month in the preceding year.

Q. The next column is entitled 1958; what is that?

A. Those are actual sales figures from the sales journal for the twelve months in 1958.

Q. Then we have a column entitled "Increases over previous year." What are those figures?

A. That is a similar analysis of the preceding year, 1957 sales in regard to 1958 sales; the relative increase or decrease in that 12-month period.

Q. And then finally there is a figure called 1959. What are those figures there?

A. Those are for January and February, sales figures from the sales journal.

Q. And the final column shows increases over the previous year, or so designated. In fact, it shows a decrease, [fol. 90] does it not?

A. This would be relative to the previous two months of 1958.

Q. From what records were these figures prepared?

A. These were from the sales journal and also from the sales figures of the accountant. In other words, the controlling account.

Q. Are they correct?

A. To the best of my knowledge, sir, they are.

Mr. Oles: We offer No. 6, your Honor.

Mr. Hoague: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 6 for identification was received in evidence.)

(Ledger Sales marked Plaintiff's Exhibit No. 7 for identification.)

(Ledger Sheet marked Plaintiff's Exhibit No. 8 for identification.)

Mr. Oles: I would like to mention at this time in connection with proposed Exhibit 8 that I have the original here in the courtroom, of the ledger page from which that was prepared, in the interest of not utilizing the original and keeping it out of the court files I have offered as an exhibit a photo copy.

Mr. Hoague: We won't object to the photo copy aspect of it.

By Mr. Oles:

Q. Handing you first, Mr. Conom, what has been marked for identification as Plaintiff's Exhibit No. 7, what is that?

A. This is a sales breakdown on the Jordan Baking Company purchases for 1957, and 1958, and 1959.

[fol. 91] Q. Now, in the left-hand column of this proposed Exhibit 7 is a list of what appears to be dates, is that correct?

A. Yes, sir.

Q. And what are those dates? What do they refer to?

A. They refer to shipping dates.

Q. Shipping dates?

A. Yes.

Q. Next we have in the middle column something entitled "Rye". What is that for?

A. Rye is a general term for a flour.

Q. This is rye flour?

A. Rye flour, yes, sir.

Q. You have heard the testimony today about something known as dark rye or Hofmueller flour and light rye flour or Triple-Aught flour. Are both these figures combined in these shipments as marked on proposed Exhibit 7?

A. Well, in certain periods there are no rye shipments.

Q. But I mean, where it shows rye, that means all rye flour, does it?

A. Yes, sir, it would.

Q. Then the next column has the figure "St. Gr." at the head of it; what is that?

A. Oh, I imagine that stands for "Stone Ground".

Q. And again these figures will mean what?

A. Those mean purchases on those specific dates.

Q. By the Jordan Baking Company?

A. By the Jordan Baking Company, yes, sir.

Q. And then there are totals shown at the bottom of the exhibit, is that correct?

[fol. 92] A. Right, sir, there are.

Q. From what records was this proposed exhibit prepared?

A. This would be from the individual account of the Jordan Baking Company, from the sales journal.

Mr. Oles: In passing, Mr. Hoague, we have already in the record as Exhibits 2 and 3 the figures of the Jordan Baking Company, I believe that they are identical.

Mr. Hoague: They should be.

Mr. Oles: However, I at least have found the figures produced by the Jordan Baking Company almost wholly incomprehensible in trying to understand their method of keeping books, and so this exhibit is not intended to contradict, but merely to simplify and clarify the exhibits already offered relative to the purchases by the Jordan Baking Company.

Mr. Hoague: May I ask a question about this?

Mr. Oles: Certainly.

Mr. Hoague: When it says "54.50", is that dollars?

The Witness: Yes, sir, all these figures.

Mr. Hoague: This is money, not weights or bags?

The Witness: No, this is in dollar value.

Mr. Hoague: I see. No objection.

The Court: The Court understands that Exhibit 7 is basically based on 1 and 2?

Mr. Oles: 2 and 3.

The Court: So that the facts asserted on 7 do not speak for the truth of those facts because they merely are a re-[fol. 93] capitulation of 2 and 3?

Mr. Hoague: Except that 2 or 3 do not make reference to stone ground.

Mr. Oles: I don't believe they are particularly important, but they indicate the total amount of business done by the Lucas Flour Company.

Mr. Hoague: No objection to Exhibit No. 7.

The Court: No objection?

Mr. Hoague: No objection.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 7 for identification was received in evidence.)

By Mr. Oles:

Q. Now, handing you what has been marked for identification as Plaintiff's Exhibit No. 8, what is that?

A. This is the original and photostatic copy of the sales journal of the Moorhead Baking Company located in Tacoma.

Q. And what does it show relative to sales by the Lucas Flour Company?

A. It shows that sales were, somewhere during the period of May, were terminated and there are no future entries in it. But it also shows that this begins in 1957 and they were consistent sales periodically, probably every three weeks or every month.

Mr. Oles: I wonder if I could hand to the Court with Mr. Hoague's permission the original itself; it is easier to read than the copy.

Mr. Hoague: No objection to Plaintiff's Exhibit 8.

Mr. Oles: We will offer Plaintiff's 8.

[fol. 94] The Court: No objection?

Mr. Hoague: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 8 for identification was received in evidence.)

By Mr. Oles:

Q. Mr. Conom, have there been any sales to Moorhead Bakery following those which are listed on Exhibit 8?

A. No, sir.

Q. Have there been any sales to Jordan Baking Company of rye flour following those listed on Exhibit 7?

A. No, sir.

(Itemized damages marked Plaintiff's Exhibit No. 9 for identification.)

By Mr. Oles:

Q. Now, Mr. Conom, handing you what has been marked for identification as Plaintiff's Exhibit 9, will you tell us what that is?

A. That is an itemized list of certain costs during the period in question of the strike.

Q. Now, it is entitled "Itemized Damages", but it is in

fact only a list of those actual costs during the strike, am I correct?

A. Yes, sir.

Q. Now, the first item is railroad demurrage. Would you kindly advise us what that shows?

A. Railroad demurrage shows a certain number of cars, car numbers, their arrival date, their departure date, and specific charges levied by the railroad company because of certain delays in being unloaded.

Q. Now, you say delays. Does the railroad company [fol. 95] charge for every day that the car is on the siding next to your plant?

A. We have what is commonly called "average agreement" with the railroad company that in a period of certain days we take in so many cars. If we unload them rapidly we can get credit, or if we delay the cars we get debited, then the thing is offset at the end of the month and accordingly we pay.

Q. Now, the charges that have been listed in the first position of proposed Exhibit 9, the charges that are shown in the first portion of proposed Exhibit 9, what does that represent?

A. That represents the total demurrage due to the railroad from the Lucas Flour Company for the above mentioned cars.

Q. And why was this demurrage paid?

A. Why was it charged? It was charged because according to the arrivals and according to the departures the days involved there were much longer than customarily, than would normally take the cars to be unloaded. Consequently there was a charge made for demurrage.

Q. Why did these delays take place?

A. These cars were delivered on the siding approximately during the time of the strike. There was no possible way of unloading them unless and until such time as the strike ended.

Q. And the total charge of that type is $122.57, is that correct?

A. Yes, the total.

Q. The next item is entitled "Truck Rentals". What is [fol. 96] that item?

A. Truck rentals; two trucks were rented, I believe, two or one, I don't remember exactly, on June 5 to handle some extra orders that we had after the strike terminated.

Q. Then we have an item called "Operating Expenses". Would you explain how that is calculated?

A. Well, we have taken the profit and loss statement as of September 30, 1958, and have arrived at a figure of $6,111.59, the fixed cost for a period of one month. We have determined seven working days constitute one-third of the month. Therefore, have divided those fixed costs by 3 and arrived at a figure of $2,037.19.

Q. Now, could these figures be reconstructed out of Exhibit 5, the profit and loss statement?

A. If that is the profit and loss statement for '58 up to September, yes.

Q. This is actually the December 31 statement, Mr. Conom rather than September 30 statement. Now, in addition there has been an item called "Lost Profits". How did you arrive at that figure?

A. That would be relative to the total income for the period. And I think it averages as a net profit of about 1½%.

Q. You are talking about gross profit on sales in this instance, or what?

A. Well, I think this would be net profit on sales, $370.

Q. Then we have a small item of a deduction of $1.52, and the purpose of that is what?

A. We included the overall truck rental for that one-third period, therefore we subtracted it in order that we [fol. 97] wouldn't duplicate the expense and that brings it out to a total of $2,569.10.

Q. Now, Mr. Conom, what is your opinion as to whether or not this is an accurate reflection of the operating expenses of the Lucas Flour Company during the period of the strike?

A. Well, there is no question as to the validity of these expenses. The fixed expenses continued. The extra expenses that are itemized were incurred during that period.

Mr. Oles: We offer Exhibit No. 9, your Honor.

The Court: Any objection to 9?

Mr. Hoague: May I have a moment, your Honor?

The Court: Yes, certainly, all the time you need.

Mr. Hoague: I would like to ask some questions with reference to Exhibit No. 9.

Voir dire examination.

By Mr. Hoague:

Q. I am concerned with this operating expenses which you figured out to be $2,037. Was this arrived at by just taking what were the operating expenses on your 1958 profit and loss statement and dividing by 36 in substance?

A. Yes, sir.

Q. Then it includes all of the expenses that are listed under Exhibit 5, under operating expenses, is that correct?

A. That would be right, yes.

[fol. 98] Q. And that is divided by 36 and comes out to the figure you have there?

A. With this exception, the operating expenses excepted as to this figure that is stated there. It itemized damages. The individual damages do not appear. They were not involved in the overall exception. That is the reason of that $1.52 credit, to eliminate a duplication in the operating expenses. The demurrage and a truck rental, if my memory serves me correct, were not included.

Q. But other than that you took the operating expenses as set out?

A. Yes.

Q. I do not understand how you reached the loss. You took the profit for the year 1958 and divided by 36?

A. Approximately, yes, sir.

Q. You say approximately; what did you divide by?

A. Well, if you were to divide, figuring on this amount here, would be I said approximately one and a alf percent of sales.

Mr. Hoague: No objection to Exhibit 9.

The Court: Then it is admitted.

(Whereupon, Plaintiff's Exhibit No. 9 for identification was received in evidence.)

Mr. Oles: In this connection I think it might clarify it a little bit that Exhibit 5, to which reference has just been made, is a year end, or December 31st statement.

[fol. 99] Direct examination (Cont'd).

By Mr. Oles:

Q. Now, Mr. Conom, Exhibit 9 was prepared from not a year-end statement, but a September 30 statement?

A. Yes.

Q. Was that prepared in response to a motion by the defendant and submitted prior to the existence of a December 31 statement?

Mr. Hoague: When I don't object to this, I don't want it to be implied that this is a waiver of my attacking this as a proper method of determining damages.

The Court: I don't know what that reservation has in the overall effect in the admitting of the exhibit; for whatever your reservation is, we will consider it at the time of your argument.

Mr. Oles: I would like to ask Mr. Hoague if he will agree with me that Plaintiff's Exhibit No. 9 is an itemization that was provided to him in response to a motion to make more definite and certain an order of the Court some weeks ago, is that correct?

Mr. Hoague: I believe so.

Mr. Oles: It is identical.

Mr. Hoague: It is identical. I know we had received it some weeks ago. Whether we did in response to an order of the Court I can't remember particularly. At any rate, we did receive that a month or two ago.

Mr. Oles: Yes.

By Mr. Oles:

Q. Now, Mr. Conom, did you have occasion yourself to [fol. 100] see any of the activity of these pickets?

A. Yes, I did.

Q. Would you describe what you saw?

A. Well, when I came into the office the day of the picket-

ing, the pickets were in front of the building, then I went right into the building.

Q. Let me interrupt and ask you how many pickets and where they were then located?

A. At the time I came in on the 27th, I believe there were three right in front of the entrance to our building; that is on the road in front of the entrance to the building.

Q. Now, what else did you observe regarding these pickets?

A. Well, when I came out at periods of time during the day I saw the truck from Kraft, he was being told not to deliver anything to the company.

Mr. Hoague: I object to the form of the answer.

The Court: The portion of the answer which is hearsay will be stricken.

By Mr. Oles:

Q. Just state what you saw regarding this truck, Mr. Conom, unless you overheard something being said.

A. I did overhear it being said.

Mr. Hoague: By whom?

Mr. Oles: Describe in detail just what you heard and saw.

A. I saw the Kraft truck stop in front of our place, the man getting out with a bundle of invoices. At that time somebody told him not to come in because the place was picketed.

[fol. 101] Q. You know who that somebody was?

A. I can't recollect just exactly which one made the statement.

Q. One of the pickets?

A. Yes, sir, one of the three that was involved. The man got into the truck and went back to his plant.

Q. At least he drove away. Now, will you go ahead with any instances that you recall.

A. Yes, sir. H & H Baking House out of Yakima came in to pick up salt. The truck was told that because of the pickets he could not make any pickups.

Mr. Hoague: I object to the latter part of the answer.
The Court: Sustained.
Mr. Oles: I am sorry, your Honor, I didn't hear that. My missing exhibit just arrived. I am glad it is here, and I didn't hear the last part.
The Court: He used the same language where I sustained the objection, where he said somebody told him. I sustained the objection to the portion that was hearsay.

By Mr. Oles:

Q. What did you hear or see, yourself, regarding the H & H Baking truck?
A. The H & H Baking truck came in to back up to pick up salt.

Mr. Hoague: When?
The Witness: During that period of the strike. The truck was not allowed to load up.
Mr. Hoague: I object.

By Mr. Oles:

Q. What did you see or hear, Mr. Conom?
[fol. 102] A. I saw the truck come in and then I saw the truck pull out.
Q. Did they leave or pick up a shipment?
A. No, sir.
Q. Do you know what they came for?
A. Yes, sir; salt.
Q. To pick up salt?
A. Yes, sir.
Q. The Lucas Flour Company sells salt?
A. We sell many items, including salt, yes, sir.
Q. Any other instances?
A. I saw the Consolidated truck with a shipment from Pillsbury that was not allowed to deliver to us.

Mr. Hoague: I object to the latter part of that.
The Court: Sustained.

By Mr. Oles:

Q. Just state exactly what you saw or heard, Mr. Conom.

A. I saw a truck from Consolidated Freightways stopping at the warehouse and leaving the warehouse.

Q. And did they pick up or deliver anything while there?

A. No, sir.

Q. Any other instances?

A. To the best of my ability I can't think of anything else.

Q. Now, Mr. Conom, did you ever have occasion to make any of these deliveries in a car?

A. Yes, sir, I did.

Q. Would you describe what occurred then?

A. I took a few sacks in my car to deliver to certain [fol. 103] accounts, and I was followed by a member of the pickets.

Q. When was this?

A. This would be Wednesday, I think; that would be the 27th.

Q. The first Wednesday?

A. May 28.

Q. May 28, 1958?

A. Yes.

Q. Would you state what occurred on that occasion?

A. When I was followed by the picket?

Q. Yes.

A. I took off in my car and he followed me all the way to the Bake-Rite Bakery on 14th Avenue. He parked across the street and I, of course, went in the back to deliver. Then I went into the bakery and spoke to the owner of the bakery. I asked him that I had two items, or one item to deliver, and asked him if he would take it although there was a member of the Union following me. At that time he entered the door.

Q. Who entered the door?

A. The picket.

Q. Do you know the name of that picket?

A. No, sir, I don't.

Q. Did he have any sign on him or with him?

A. No, sir, he didn't.

Q. He entered the door of the bakery, is that correct?

A. Yes, sir.

Q. And what happened then?

A. Well, the owner told me to go ahead and unload it. [fol. 104] And while I was leaving the picket and the owner started a conversation. I didn't wait. I unloaded and got on my way and I lost the picket.

Q. Did you hear anything that the picket said?

A. Not very audibly, sir; no, sir.

The Court: It is time for our usual recess. We will recess now.

(Recess.)

By Mr. Oles:

Q. Mr. Conom, will you kindly resume the stand.

Am I correct, all the exhibits to date have been admitted?

(Ledger Sales Sheet marked Plaintiff's Exhibit No. 10 for identification.)

By Mr. Oles:

Q. Mr. Conom, I am now handing you what has been marked for identification as Plaintiff's Exhibit 10. What does this exhibit show?

A. This exhibit is an analysis of 1957 and 1958 sales; potential increases or decreases in that period of time.

Q. Now, starting at the top there is something designated, "Average increase of gross sales, first five months of 1958 over first five months of 1957." How was that figure arrived at?

A. We have taken the increases for the first five months of 1958 and averaged them out; they equal 24% for the first five months of 1958 relative to the first five months of 1957.

Q. Now, the next item is designated "1957 gross sales, [fol. 105] last seven months." What is that?

A. We have taken the actual figures from June inclusive to December from the sales journals and we have arrived at a figure of $433,826.51.

Q. Is there another exhibit in the files here from which these figures could be calculated, could be made?

A. Yes, I am holding Exhibit 6 in my hand here.

Q. Then we have note of "124% of above". What does that figure represent, Mr. Conom?

A. That figure would represent the period of June, inclusive, to December at relative 124% increase on sales; with the sales of the last seven months of 1958 equal to the first five months in 1959, at a base rate of 100% plus 24% increase. The last seven months of 1958 should be $537,944.87.

Q. Now, what were the actual gross sales during that period, the last seven months of 1958?

A. The actual gross sales taken from the sales journal again is $375,096.89, and the difference is the next figure, simply the figure preceding the two figures. The figure of $162,847.98 is derived from subtracting the actual gross sales for the last seven months of 1958 from the potential gross sales of the last seven months of 1958.

Q. Now, you apply a factor on this proposed exhibit of 9%. How do you arrive at that figure?

A. Through the last two or three years our average gross profit on sales is approximately 12%. With such an increase as the one mentioned before, the anticipated increase, the operating costs would reduce by roughly one-quarter, or [fol. 106] 3%, therefore it would leave roughly a gross profit of 9%.

Q. And the final figure of $14,656.32, represents what?

A. It would be a profit to the company had the sales actually been the same in 1958.

Q. No, Mr. Conom, have you any opinion as to whether or not the calculations you have just reviewed and which are reflected in Plaintiff's Exhibit 10, proposed Exhibit 10, are good or bad reflections of loss of profit in 1958?

Mr. Hoague: I think at this time, your Honor, I am raising an objection because I think this question goes to the admissibility of Exhibit 10. And we object to Exhibit 10 on the basis on which it is made, on the ground that it is too speculative, it is somewhat like in a condemnation proceeding where the vacant land is being condemned. The

owner is not allowed to put in testimony as to how much the platting cost, and subdividing and building houses, because it is too "ify". It assumes too many things that are a matter of conjecture and certainly the basic conjecture here is completely speculative; that their sales would have, in the absence of this picketing, that the sa[illegible] would have been the same. We can assume fairly certainly that the sales wouldn't have been the same and for that reason we feel that it is too speculative a way of approaching the subject of damages.

The Court: Are you offering this information to simply illustrate your theory of this portion of the case?

[fol. 107] Mr. Oles: Yes, and even more specifically to illustrate only the testimony of Mr. Conom at this time, at this point. We will of course submit auth[illegible]rities showing the right to obtain this kind of damages and measure them in this way.

The Court: I will permit it to come in on that basis, but I don't want anybody to misunderstand that I am ruling the theory of this case is reflected by this at this time. I am hoping that we will have legal authorities furnished by Counsel before we have to decide that issue.

Exhibit 10 will be admitted for the very limited purposes for which it is offered, to illustrate this witness' theory as to his testimony.

(Whereupon, Plaintiff's Exhibit No. 10 for identification was received in evidence.)

By Mr. Oles:

Q. Would you state what your theory or opinion is, Mr. Conom,—I don't like the word "theory", I would like to use the word "opinion". Would you state what your opinion is as to whether or not this is a reflection of the loss of profits in 1958?

Mr. Hoague: Again, may I have a continuing running objection to this?

The Court: As far as the Court is concerned, you can have a continuing objection.

By Mr. Oles:

Q. Will you go ahead?

A. Regarding the figures of '56, '57, and '58, it would seem logical to expect a concern such as ours to show a constant increase from month to month and from year to year. We have shown that increase and it is very vital [fol. 108] to our business that we continue to show an increase. Somewhere along the line between that period of the difficulty the sales started to decline. There is no question in my mind that it has affected it quite a bit, because it is very difficult to pinpoint the actual losses with the tremendous amount of accounts that we have. We can still sell an account, but we sell them a percentage of the original amount. Therefore, I would attribute the decline to the strike and to the consequences following.

Q. Mr. Conom, are the figures contained in Exhibit 10, what is your opinion as to whether or not they represent a fair calculation of the loss to which you have just testified?

A. I think it is a very reasonable calculation. We have taken the entire year of 1957. Or had we reflected relatively between the seven months of 1957 and 1958 the increases would have been quite a bit greater than we have arrived, 24%.

Q. Would you explain just what you meant by that last comment?

A. If you will note the increases from May of '57 to December, '57 are comparatively higher than the increases in the first five months of 1957. Had we averaged out the increases there we would have arrived at a higher figure than 24 because in certain months it is 100% increase, one month it is 113% increase. Had we compared them with the figures of 1958, June inclusive to December, it would show the deficit to be tremendous because they are all minus figures [fol. 109] with the exception of one.

Q. In the years 1956 and 1957, and the first five months of 1958, is there any month which showed a loss of business as compared with the same month in the previous year?

A. Not a single month, all have an increase from a minimum of 35 to a maximum of 113 percent.

Q. From a minimum of 4%, is that correct?

A. You said '57, didn't you?

Q. Excuse me. I was talking all the way up from May of '58.

A. Oh, I see, to May '58 there would be a minimum of 4, yes.

Q. And a maximum of 113?

A. Yes.

Mr. Oles: I have no further questions.

Cross examination.

By Mr. Hoague:

Q. Mr. Conom, before the strike, I mean in the months and years before the strike, you had a certain amount of demurrage that you paid on railroad cars, didn't you?

A. I would have to check the figures to give you the exact amount.

Q. Of course.

A. Oh, an average agreement, it is very possible to have credits and debits. It is not unusual to have a charge, yes, sir. We could have a charge.

Q. When does demurrage start?

A. 48 hours after the car is spotted, except on week-ends.

[fol. 110] Q. "Spotted" means delivered?

A. Delivered to the doors, yes.

Q. And in the ordinary course of your business some cars you keep more than 48 hours, isn't that correct?

A. We don't make a practice of it, no.

Q. But you do on occasions?

A. It is very possible, yes.

Q. You have paid demurrage, haven't you?

A. Yes, under an average agreement.

Q. Now, in the course of the Lucas business, did they have any sales of carload lots to a consumer? I say, "they", I should say "you". Did you ever sell any carload lots of flours to consumers that would go directly from the mill without going through your plant?

A. Yes, sir, we have.

Q. Do you have any idea of the volume of that?

A. That is very difficult to offer right now unless I

had accounts and ledgers and figures. I couldn't give you a true figure. I could give you a rough figure; perhaps a car a month. That would amount to $2400, perhaps $2200.

Q. That would go directly?

A. Yes.

Q. What about truckload lots; do any truckloads go, in the ordinary course of the Lucas business, that would go to a consumer without depositing it in your warehouse?

A. Very rarely, if ever.

Q. Didn't do very much of that?

[fol. 111] A. Like I say, it could be a special occasion where a mill might ship for convenience purposes a small order, but it isn't feasible they would ship by truck from the shipping points.

Mr. Hoague: No further questions.

Mr. Oles: That is all, unless the Court has a question.

The Court: You may step down.

(Record of Arbitration marked Plaintiff's Exhibit No. 11 for identification.)

(Record of Arbitration marked Plaintiff's Exhibit No. 12 for identification.)

OFFERS IN EVIDENCE

Mr. Oles: At this time I am offering as 11 and 12, respectively, copies of the Record of Arbitration dated September 11, 1958, and the Award of Arbitrators dated November 7, 1958. We offer them as exhibits in this cause subject of course to Counsel determining that the copies are correct copies of the original which are on file in this cause.

Mr. Hoague: You assure me that they are correct copies?

Mr. Oles: I have not compared them. I simply have a secretary who was asked to copy them subject to her accuracy, because I believe that the record should have as exhibits these documents in it.

The Court: In any event, the Court will continue to use the one in the file and if you find there is a discrepancy, I assume the reservation made will make it conform with the copy that is now in the file being used by the Court.

[fol. 112] Exhibits 11 and 12 will be admitted.

(Whereupon, Plaintiff's Exhibits Nos. 11 and 12, respectively, were received in evidence.)

Mr. Oles: Thank you, your Honor.

Then, not as an exhibit, but as a matter of convenience only to the parties because at least I found that printed contract a little awkward to read, I am handing a copy of the pertinent provisions of the contract for whatever use they may be for Court and Counsel, it being understood that Exhibit 1 is the true and correct original of the agreement.

Mr. Hoague: No objection.

PLAINTIFF RESTS

Mr. Oles: What I have done is simply eliminated the clauses relating to wages and fringe benefits, which have no pertinency to our case. And with that, your Honor, the plaintiff rests.

The Court: Are you ready to proceed?

FURTHER OPENING STATEMENT ON BEHALF OF DEFENDANT BY MR. HOAGUE

Mr. Hoague: Yes, your Honor.

I think I will make a little summary of our theory of the case.

We are not entitled to question the matter as to whether Mr. Welsch was discharged for unsatisfactory service because that is foreclosed to us by arbitration.

I had better state some facts. On May 12, Mr. Welsch was injured on the job. He took sick leave, which is without pay, until the 23rd of May. On the 23rd of May he called up and asked if he could have his vacation pay for one week. Theretofore, for the previous five years, he had taken vacation pay without taking a vacation. In other [fol. 113] words, he had been paid double time and this was at the request of both, or for the convenience of both Mr. Welsch and the Lucas Flour Company. If he took a vacation, it meant that they had to break in a man for two weeks, and by the time they had him broken in, the vacation was over and they would have to let him go.

He had been paid one week of his vacation pay for the year 1957 and 1958 and had not received the second week's

vacation that he is entitled to under the contract. So he called up and said, could he have the vacation pay.

His wife went down to get his pay check and there was a note with the pay check, which note is in the Court's file and which we will introduce into evidence, which said, "Keep on vacation. If we have enough work, we will call you back, and if not, just keep on vacation." He called up to find out whether this was vacation without pay and found out that it was vacation without pay.

There was at the time working for the Lucas Flour Company at least one employee who had only a few weeks seniority. He had only been with them for a few weeks. So that from the Union's standpoint this was a layoff in violation of the seniority agreement. And they called up the Lucas Flour Company and the Lucas Flour Company said "That is what we want; we just want him to keep on vacation." This is what was said on May 26th.

Mr. Rus Anderson said, "I'll be down there tomorrow and we will work this thing out." And on the 27th Mr. [fol. 114] Anderson wasn't able to be down there himself; he had some other things to do. So he sent down Nick Matula. He went down there the first time the company announced Mr. Welsch was fired as of this date. The picket line was set up immediately after that.

It is our position that regardless of whether they had the right to fire him, that they gave every indication that this was action being taken, not because of unsatisfactory service, but as a means of getting around the seniority agreement, and primarily motivated by the fact that Mr. Welsch had gone to the Union to protect his job seniority.

We feel that in any event job security is a proper objective for peaceful picketing and enforcement of course of the contract.

Mr. Anderson, will you take the stand.

STATEMENT OF OBJECTION MADE BY MR. OLES

Mr. Oles: Before you proceed, Counsel, I would like to make a statement in the form of an objection, as an objection to the statements by Counsel.

There is a doctrine sometimes involved when an opening statement increases or changes the pleadings, your Honor, and therefore so that we are not held to any such doctrine, we object to that portion of the opening statement in which Counsel asserts that the employer's action led the Union to believe that the motive of the firing of Welsch was other than that the work of Welsch was unsatisfactory; on the ground that the parties have stipulated that the award by arbitrators is final and binding and conclusive on the par- [fol. 115] ties. And on page 6 of the award of the arbitrators, a page we have often looked at, we find the following sentence in the middle of the page:

> "That morning, Tuesday, May 27, the business agent was informed by the employer's representative that Welsch was fired as of"—

then giving unsatisfactory work as the reason.

Mr. Hoague: There is no question that that is what they gave at that time.

Mr. Oles: I also, in view of Mr. Hoague's remarks, add the fact that the Board made a Finding of Fact No. 2, found on page 2, and I quote:

> "That such unsatisfactory work was the reason for Melvin T. Welsch's discharge on May 27, 1958."

So those are the apparent figures and actual reason and we will object to any testimony offered to show that the Union had some other idea of what the facts were.

The Court: You just wanted to state your objection?

Mr. Oles: I just wanted to make the record clear.

The Court: You didn't make any motion, so I don't have anything to rule on. Your objection is received in the record.

[fol. 116] FLOYD ANDERSON, called as a witness by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hoague:

Q. Will you state your name?
A. Floyd Anderson.
Q. Your home address?
A. 711 A Street.
Q. You commonly go by the name of Rus Anderson?
A. Yes.
Q. What is your occupation?
A. Business agent.

Mr. Oles: What was that address?
The Witness: 711 A Street, Renton.

By Mr. Hoague:

Q. Business agent for what union?
A. Business agent and president at the present time for Local 174, Teamsters.
Q. In May and June of 1958, what was your position?
A. I was vice-president and business agent.
Q. On Friday, May 23, did you have a conversation with Mr. Welsch?
A. Yes, sir.
Q. And what was the substance of that conversation?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Oles: I object to that question as calling for hearsay.
The Court: Conversation with Mr. Welsch?
Mr. Hoague: Mr. Welsch. We are not introducing it for the truth of the matter asserted at all, it is just for the purpose of showing some event that took place that goes to [fol. 117] the matter of motivation. They could be completely false; that is not important.

Mr. Oles: We do not believe, your Honor, that a motivation of a party is in issue in this cause under any pleading.

The Court: Motivation of Mr. Welsch or Mr. Anderson? You are trying to show that Mr. Welsch's statement gave Mr. Anderson motivation?

Mr. Hoague: That is right, reason to believe that there was a violation of the contract and that that was what led up, that is what brought about the strike. As far as the pleadings are concerned, it is certainly an issue.

The Court: Is it your position that if Mr. Anderson was motivated to do something, even though he might have acted as an unreasonable person, hastily or ill-conceived, that that was a defense to breach a contract or tortious action?

Mr. Hoague: I think it is a defense to breach of contract. There is no strike provision in this contract; no picketing provision in the contract.

The Court: Would it be a defense to a tortious action?

Mr. Hoague: Yes, your Honor. It would be a justification for their action.

The Court: If I am driving a vehicle and if I am going through a red light, does it make any defense that I had a different motive other than a violation of a red light?

Mr. Hoague: That is a different matter.

[fol. 118] The Court: It is tort.

Mr. Hoague: Certainly once you say that that is a tort, then the case is all over. My point is that this isn't a tort if they were acting for mutual security, job security.

The Court: Then it is a contract?

Mr. Hoague: Beg your pardon?

The Court: Then it is a contract? Isn't there a damage theory based on either, contract or tort, one or the other?

Mr. Hoague: It has to be one of the two.

The Court: You first said that it wasn't the contract; now you tell me that if it is tort, the case is all over.

Mr. Hoague: Once you decide this is tort, the case is all over except for damages; that is what I meant. Their theory is that it is tort. We don't accept their theory.

Certainly strikes and picketing for mutual protection, mutual aid and protection, is justification. I have a brief

here, your Honor,—not a brief, but a memorandum of authorities. I should have filed them earlier.

The Court: That is something I have been waiting for from both counsel. I haven't received a memorandum of authorities yet.

Mr. Hoague: Would your Honor want a copy of this?

The Court: I can use the original as well and probably save having less paper around.

[fol. 119] Actually, there is not much point in counsel concealing their legal theories. The Court should be educated somewhere along the line and I think it is about time.

Mr. Oles: This doesn't pertain to legal theory, but I don't want the Court to feel that I am concealing something.

Mr. Hoague: This was typed up from a quarter past 9:00 until noon.

The Court: We can erase any inferences you might have drawn adversely to either one of you. You can forget it. I could have been working on these during the recesses, although I will have to state I didn't have too much time during recesses so far.

Mr. Oles: I received this myself, your Honor, about 3:00 o'clock, when one of my associates delivered it to me.

The Court: Now, we will proceed with the legal arguments.

Mr. Hoague: In Boun v. Lumber Company, 46 Wash. (2d) 645 (1955) on page 3 of my brief, this was a suit for damages against a union brought by a supervisor who had been fired by his employer under threat of strike by the union. The union's defense was that their action was motivated by a desire to improve safety conditions in the plant and that the supervisor had either refused to remedy or had been tardy in remedying. The court held that if

> "the union acted for the purpose of their mutual aid [fol. 120] and protection in an effort to secure safe working conditions at the sawmill,"

it was a defense to the damage suit.

But if it had acted arbitrarily solely to injure the plaintiff, the union must answer in damages.

The Court: Suppose they acted pursuant to something which they had no right to under the contract? Suppose the contract would provide that the employer, as I understand this one does, has the right to fire an employee for improper services? Suppose in the means of attempting to prohibit or prevent the employer from exercising his contractual right they use as a guise the matter of this common mutual interest of security as an excuse to in effect deprive the employer of his right to fire? Then is that a defense? The motivation, is that a defense?

Mr. Hoague: That is a defense in tort, to a tort. Now, if you imply a no picketing provision in the contract, that is the only basis I can conceive for holding that there is a violation of the contract. Article 2 on which so much stress has been laid on saying that the employer has the right to fire for unsatisfactory work adds nothing to what he had in the absence of a contract. He had the right to fire for unsatisfactory work or for any reason he had in mind and nothing is added by putting that into his rights. The Union feels therefore you are thrown right back into tort law and if the Union reasonably felt that Welsch was being fired wrongfully and in violation of the contract, I think their [fol. 121] reasonability is in issue. Then there is no liability resulting from it.

The Court: So then you offer this testimony as to what Mr. Welsch said to Mr. Anderson simply to show whether or not Mr. Anderson operated as a reasonable man would because of Mr. Welsch's statement?

Mr. Hoague: Yes, your Honor.

Mr. Oles: Can I comment briefly on that?

The Court: I want to get this thought through my head at this moment. Would it make any difference if it was absolutely unnecessary for Mr. Anderson to move the next day; that is restoration of a job could have been done in two weeks or two months later without any material harm, or he could have sought action in the court for lost wages. We are talking about motivation; we are talking about motivation based on reasonableness, are we not? I seem to have difficulty getting away from the tortious proposition of a reasonable man concept.

Mr. Hoague: I think I will go along with that.

The Court: Does that enter into this?

Mr. Hoague: Whether it was reasonable for them to call a strike or not? I don't think so. If they are justified in picketing, then they are justified in picketing even though looking back on it we might say that wasn't a very—that there were other ways out.

The Court: If Mr. Anderson's motive was justified, then it makes no difference that he moved today rather than waiting patiently for a couple of days to have somebody, [fol. 122] have time to let the different thoughts sink into their minds to determine where they stood.

Mr. Hoague: I think that is true.

The Court: As things appeared to him then he can pull the trigger?

Mr. Hoague: That is correct, without waiting to see whether his first glance was correct or not. I believe so. I am trying to think this rightly.

The Court: You have an advantage over the Court in that you have had time to read all these cases and I am trying to get these legal points as rapidly as I can to receive your evidence.

Mr. Hoague: I didn't have this too much in advance. I ground that rough draft up last night at about 10:00 o'clock down here.

The Court: I assumed both of you had had an opportunity to process through these notes in your mind.

Mr. Hoague: That is true.

The Court: I think in order to receive the evidence at this moment I will hear from Mr. Oles first.

Mr. Oles: This is a very difficult field of law and although I haven't read this pre-trial by Counsel, I agree in part at least with the first sentence.

The Court: It hasn't been passed on. We are in an uncharted area.

Mr. Oles: Your Honor, this case rests either in tort or in contract and I am glad we are not in common law because I would have been in some trouble. But if it is in tort, the tort is coercive picketing. And we have exhibited [fol. 123] to the Court and can submit further authorities that coercive picketing is a tort for which damages are allowed by the courts of the State of Washington, that tort

is committed utterly regardless of motive. It isn't the motive that is concerned here any more than, as the Court aptly pointed out, the driver who goes through a red light, although that is a negligence tort, this is an intentional tort. But intent and motive aren't the same things. It is the intent. If the intent and conduct are coercive, then that is what matters here. Now, what is coercive picketing as defined by our courts? It is, among other things, coercive either by the way in which it is conducted, and the testimony shows here, we believe, coercive picketing in the manner it was conducted, or coercive as to the purpose. And again we believe that is true here because the purpose was to force Mr. Welsch to be re-employed.

Now, we have the advantage of hindsight of this because we have a conclusive determination before this Court that he was properly fired, and that he didn t have to be re-employed and therefore ex post facto, if you will. The fact remains that it was coercive in intent as well as in manner. It doesn't do any good to explore the motives, however good; and that is not before us.

The alternative theory is that it is a case in contract. Apparently it is Counsel's position that in the absence of a no strike contract that an employer can be struck any time on a matter in direct violation of the contract. I don't [fol. 124] think the Union really thinks that.

There is implied in every labor union contract that these are the working conditions, and one of the working conditions is that the employer shall fire, and may fire an employee whose work is unsatisfactory. Again, we have already decided by a Board of Arbitrators that he was fired for that reason and none other. And therefore, this was a strike to force us to re-employ somebody that we didn't have to. That I submit is a breach of the implied clause there in the contract. In addition there is an arbitration clause. It says in the event a dispute arises certain things shall be done and arbitration shall take place. I don't know whether this is implied or expressed, but surely before going out on strike the Union is compelled to follow the remedy of the contract and therefore we contend this is also a breach of contract or of necessarily an implied condition thereof.

Again, if it is a breach of contract the motive is irrelevant as in any other breach of contract case. You may fail to pay your note when it comes due at the bank, but because you were using the money to support your children who badly needed an operation, your motive doesn't help you.

He cites the Boun vs. Lumber Company case with language that seems to imply that motivation makes a difference. In the Boun case the defendant union went on strike. The plaintiff claimed that it was because he was employed as a supervisor and he was a person unpopular [fol. 125] with the union and he asserted this strike forced the employer to fire him, the supervisor. The union said, "Oh, no, we went out on strike over working conditions; it wasn't a safe mill."

You see, there it isn't really motive regardless of the language of the court in its intent and there is quite a distinction. The intent here is not in dispute. The intent regardless of motive was to force this employer to re-hire this man. There is no third possibility existing and we don't therefore think this language in context helps the defendant much in this case.

Mr. Hoague: I don't believe there is anything out of context at all about it. I might say that looking very briefly at Mr. Oles' brief he cites case after case after case where the reason they held the picketing was coercive was because the motive of the pickets was to force the employer to force his non-union employees to join the union; and it is held that the statutory policy of this state to leave employees free to join or not join, and therefore it is coercive. And I am looking at the Gozzam, the Swenson case and the Safeway case. Each one of these, motive is the thing that it turns on.

The Court: Would a business agent be justified in, particularly in a well-established and mature union such as this one, that has been in this community for many years, acting on the claim of any workman that comes running down to the union hall, then running out the next morning, and irrespective of an agreement to arbitrate, or an agree-[fol. 126] ment to do this or do that, to have a strike? To act on evidence that comes in that hastily?

Mr. Hoague: That is just what I am trying to show, that this isn't just the say-so of Mr. Welsch, this is written. We have some written evidence as to what the company was saying; they were saying he was laid off.

The Court: In other words, Mr. Welsch's testimony or Mr. Welsch's statement would be part of a mosaic to show the motive and reason behind Mr. Anderson's action and would form a part of the mosaic to show the background as to whether or not the business agent was acting as a reasonable man in moving without first getting arbitration or making further negotiations with the employer?

Mr. Hoague: I wouldn't go along with that. I say as a reasonable man in believing that the company was trying to violate the general contract provisions. I think that once you say he was reasonable in believing they were violating the seniority provisions, whether he chooses to avail himself of arbitration or not, or whether he wants to set up a picket line is beside the point. Had the company asked for arbitration and the Union refused to arbitrate, then there would be a violation of the contract. No such request was made by either side. Both sides decided to slug it out, if you will.

The Court: Well, it would help the Court in understanding the briefs if he would answer the question.

[fol. 127] By Mr. Hoague:

Q. Do you remember the question?

The Court: Overrule the objection. The record will show that Mr. Oles has violently objected.

By Mr. Hoague:

Q. What was the conversation that you had with Mr. Welsch on the 23rd?

A. Welsch came to my office and he said that he had been injured, a bull had toppled off on him. I asked him if he was going back to work and he said, "Yes." He had just been released from the doctor. I said, "Well, what are you doing now?" He said, "I am on vacation." I said, "Okay. I will check and find out." So I called down there and I talked to Nick, and I talked to Pete both. And I asked him "What

about Welsch?" And they told me the same thing; that he was on vacation. So I said, "Fine and dandy."

Q. Pete Conom?

A. Yes, and Nick Lucas, both said that he was on vacation. So in the meantime I said, "That's swell." And I hung up. When I was through I yanked his pants leg up and his leg was all black and blue and I said, "Jack, are you capable of going back to work with that leg?" He said, "Oh, yes, it doesn't hurt; it's just black and blue." So I said, "Have you got a release from the doctor?" And he said, "Yes, he released me." I said, "A written release?" And he said, "No." I said, "I would suggest to you that you go to a doctor and get a written release, then go down and see them, showing them your release so that they are in the clear and you are in the clear and they should auto-
[fol. 128] matically put you back to work." And he agreed to do it.

Q. Now, at that time did he show you a slip?

Mr. Hoague: Your Honor, may I have the file? I wonder where I can get this slip.

The Court: Mr. Riddell doesn't like you to take anything out. If you take it up to the photostat department, they will photostat it for you.

By Mr. Hoague:

Q. Have you ever seen the note that is tacked onto what is marked Exhibit 3 in the Court's file?

The Court: I don't think that will help you too much. That is Exhibit 3 to Item something else, No. 28.

Mr. Hoague: Exhibit 3 to Item No. 28.

A. Yes, I have seen this.

By Mr. Hoague:

Q. When did you see it?
A. I believe I saw that on Friday.
Q. On that Friday?
A. I believe so.
Q. Who showed it to you?
A. Jack Welsch.

OFFER IN EVIDENCE, OBJECTIONS THERETO AND OVERRULING THEREOF

Mr. Hoague: I will offer this in evidence at this time on the understanding that I will get a photostatic copy.

The Court: Any objection to that document being in evidence and then substituting a copy?

Mr. Oles: Yes, I object, not to the substitution, but I object to the evidence as irrelevant and immaterial as relating to an issue which is not in evidence and as constitut-
[fol. 129] ing a variance in the pleadings, in violation or seeking to impeach the decision of the Award of Arbitrators. I think that is enough objections.

The Court: Well, it is in the file. Why don't you, instead of getting a photostatic copy, why don't you just type the language over and have it available, and after I have read your briefs I will just take this offer under advisement and rather than ruling on it now, I will take it under advisement.

It is time for the evening recess so we will recess until tomorrow morning at 9:30.

Do I have memorandum of authorities from both counsel?

Mr. Oles: My authorities, as I have indicated, pertain only to the issue of damages in this type of case. We have not gone back to the original issue of whether an injunction can be granted in this sort of case, because as I indicated in the opening statement, I don't think there is any major issue in this case. If it should arise, we can submit authorities to the Court.

Mr. Hoague: We are opposing the issuance of an injunction.

Mr. Oles: Yes, but you haven't submitted authorities on it, have you?

Mr. Hoague: Yes, I have.

The Court: For the moment I was concerned with the defense to your matter of damages which Mr. Hoague is asserting here. It is a matter we have been discussing at some length and I wanted to know whether I had your legal [fol. 130] thinking on this particular point.

Mr. Oles: Yes, sir.

The Court: All right. Thank you. I will look this over during the evening recess.

We will recess now until 9:30 tomorrow morning.

(Whereupon, court was recessed until Tuesday, March 17, 1959, at 9:30 o'clock A.M.)

[fol. 131] MORNING SESSION

Tuesday, March 17, 1959
9:30 o'clock A.M.

FLOYD ANDERSON resumed the stand for further direct examination as follows:

The Court: I have studied your briefs during the evening, so I am more informed than I was yesterday.

Mr. Hoague: Your Honor, at your suggestion I had this note that is in the file copied verbatim and typed up. I have given a copy to Mr. Oles. I have copied it verbatim even with the typographical error that is in it. The word "than" is obviously intended to be "then".

I ask that it be marked.

(Note dated 5-23-58 was marked Defendant's Exhibit No. 13 for identification.)

Mr. Hoague: I offer Defendant's Exhibit 13 in evidence.

Mr. Oles: We object for reasons indicated yesterday in connection with this line of questioning; irrelevant and immaterial, tends to retry the issues determined by the Award of Arbitrators.

The Court: You are not objecting to the substitution of a copy?

Mr. Oles: Not at all.

The Court: Purely on the merits of the document itself. 13 is admitted.

(Whereupon, Defendant's Exhibit No. 13 for identification was received in evidence.)

The Court: There is a handwritten statement at the [fol. 132] bottom of this.

Mr. Hoague: There is one thing I would like to state for the record: On the original note at the bottom is written under the signature "Pete", is written in pencil, "Connom". We did not have that word put on the substitute because we believe that was put on sometime after the note was utilized. If Mr. Oles would like to have that on, we have no objection, but I just don't want any misunderstanding on it.

The Court: You see what he is talking about?

Mr. Oles: Yes, your Honor, I recall. I think there is no problem about it.

Mr. Hoague: All right.

The Witness: This is the note that Jack Welsch gave to me Friday, the 23rd, the night of Friday the 23rd before my telephone conversation with the company.

By Mr. Hoague:

Q. Now, did you see Jack Welsch? When was the next time you saw Jack Welsch?

A. Monday.

Q. Do you remember whether that was morning or afternoon?

A. That was in the morning.

Q. What conversation did he have with you?

Mr. Oles: I wish to make the same objection that I have just made to the continued line of inquiry as to the motives of the Union. I think that is fair to the Court to point out what we are getting into. This is dealing with a small and one-sided approach to the events that led to the strike. If this is relevant and if we are not bound, [fol. 133] as I contend we are, by what the Board of Arbitrators found, and that is the complete record of what occurred prior to the strike, then we are forced to retry this whole issue and I don't know how we can make a full record without going back and putting all your witnesses back on, extending this trial to state what we understand is the whole background of this strike, going back to the various efforts to try and fire Mr. Welsch and the attitude of Mr. Anderson and others, and their threats, and to use all which would bear upon their motives. And I once again

want to emphasize this is not merely a technical objection. We are opening up an area here where in effect we are going to have to retry something that was once tried at great expense and expenditure of a great deal of time. The Award of Arbitrators in its opinion represents, in our judgment, the complete and final decision of everything that could have or was actually decided at that time by the Board of Arbitrators. Many days of hearings took place, many witnesses were examined. And now they are picking out their witness and asking him the same questions they asked him then. All these things are in the record and the arbitrators heard it and arrived at an opinion as to why and how Mr. Welsch was fired.

The Court: Objection overruled.

The Witness: I talked to him. He stopped in and I talked to him Monday. And he said that he had been down and they had told him to take some more vacation. So I called Pete Conom. Pete said he wasn't handling it, that [fol. 134] Nick Lucas was handling it, that he would have Nick call me back, which Nick did later on that afternoon.

By Mr. Hoague:

Q. Before we get into your conversation with Nick, had you had any conversation with any of the Lucas's or any of the officers of the Lucas Flour Company in the years preceding that about Jack Welsch's vacation?

A. Yes, approximately—I would say approximately three years before.

Q. And what was that conversation?

Mr. Oles: Objected to, your Honor, irrelevant, immaterial.

Mr. Hoague: That is just to show we are going to get into the question as to what the arrangements were regarding Jack Welsch's vacation. This is the only part of the three years back that I am going into. This bears very directly on the question that he take vacations.

The Court: It bears on the question of whether or not Mr. Anderson was in good faith in assuming that there was an abuse by the employer?

Mr. Hoague: That is correct.

The Court: And lack of good faith on their part when they said they were discharging Mr. Welsch because he was not a satisfactory employee, but as a matter of fact he had reason to believe that they had another reason other than unsatisfactory, and you are now putting this on to show that he was in good faith in his belief that there was a subtle and different motive on the part of the employer; is that the purpose?

[fol. 135] Mr. Hoague: That is the purpose.

The Court: Well, I can see the previous line of questions being relative. The date of the proximate cause of the action by the business agent Mr. Anderson, going back three years, gets to be a little remote. Mr. Anderson has so many employers that he has to deal with, how can he recall what the arrangement was with one of his many employers, relative to the vacation of one of their employees three years ago?

Mr. Hoague: Perhaps I can show the point by asking him a few more questions, then I will re-ask this question, then your Honor may be able to rule on it.

The Court: All right.

By Mr. Hoague:

Q. You said you talked to Pete Conom on Monday and he said Nick was handling it?

A. Correct.

Q. Nick called you back?

A. Yes.

Q. About what time of the day was that?

A. That was in the afternoon.

Q. Nick Lucas?

A. Correct.

Q. And what was the conversation you had with him?

A. I asked him about it. I said, "What is the problem with Jack Welsch?" And he said, "We have no problem. The man is on vacation." I said, "But, Nick, he has already had his vacation. He has already been paid for one vacation and you have already paid him for the other vacation." [fol. 136] He says, "Yes, but we are putting him on a third week's vacation." I said, "With pay?" And he said,

"Definitely not." I said, "He is only entitled to a two weeks' vacation within the period of a year." He says, "There is nothing in the contract that we can't put him on vacation as long as we like." And I said, "Oh, there is."

Q. What if anything was said about tying up the plant?

A. At that time I told him, I said, "Well, I think we had better get our heads together. I will come down and thresh this out." He said, "You are coming down and tie us up?" I said, "No, nobody said anything about tying it up. I said we will come down and thresh this thing out."

Q. What if anything was said about another employee at the plant?

A. He accused me of being prejudiced against another employee down there and I said that I wasn't.

Q. Who was that employee?

A. A fellow by the name of Anderson.

Q. Do you know his first name?

A. Slipped my mind.

Mr. Hoague: May I suggest to the witness the first name?

Mr. Oles: I don't object.

By Mr. Hoague:

Q. Would it be Lawrence Anderson?

A. That is correct.

Q. What was said about Lawrence Anderson?

A. I said, "Who have you got working in Jack's place?" And he said, "Lawrence Anderson." And he said, "You [fol. 137] don't like him?" I said, "I have no hard feelings toward Lawrence Anderson." And he said, "Well, you had some trouble with him." I said, "We didn't have any trouble with him, Safeway had trouble with him." And he said, "You are trying to get me to get rid of him." I said, "No, I am not. I am trying to get you to abide by the seniority clause in the contract." He said, "We are going to put Mr. Welsch on vacation for another week." And that is when I said, "I will be down to thresh this thing out."

Q. What if anything was said about Mr. Anderson's seniority?

A. He was the newest man there.

Q. What was said about him?

A. Not a thing.

Q. Nothing was said to Nick Lucas about his being the newest man there?

A. I said he was the newest man there.

Q. What if anything was said about a doctor's release?

A. I told him that he had already been released from the doctor and he was able to go back to work.

Q. You told who?

A. Nick Lucas.

Q. What if anything was said about discharging Jack Welsch at that conversation?

A. There was nothing said about him being discharged. The only thing that was said, they were going to put him on vacation. There was never anything said about his being discharged.

Q. Now, I will renew my question. What conversations did you have with Lucas Flour Company about vacation [fol. 138] arrangements for Jack Welsch?

A. I had talked to the two boys, they had asked me if it was all right with us, with the Union, if they could work Jack Welsch during his vacation.

Q. Who asked that?

A. I talked to Nick and Pete both on it. And I said, I asked him the reason why, and he said it worked a hardship on the company if they didn't. They had so many items that a new man coming in would create problems to the extent that he would get the orders mixed up and everything else. They said, "We have a new man coming in for two weeks and everything is balled up for those two weeks. He would make mistake after mistake. So what we would like to do is to have a regular employee work his vacation and we will pay him for it." I said, "If it is all right with Jack Welsch, we would have no objection at all." When I said, "we", I mean the Union. We realized their problem.

Q. Did you go down the next morning?

A. No, sir.

Q. Why was that?

A. We were having a problem with Safeway at that time, Safeway Stores, and we were going to sit down 'hat morn-

ing and thresh things out. Consequently, I asked Nick if he would go down with Jack and find out what the problem was.

Q. There are two Nicks here.

A. Nick Matula, who was a business agent.

Q. You asked him to go down?

[fol. 139] A. Go down with Jack Welsch and find out what the problem was down there at Lucas Flour Company.

Q. What was the next thing you heard on Welsch and the Lucas Flour Company situation?

A. Nick called me back, I would say shortly after 8:00 o'clock, and he said—

Q. 8:00 A.M.?

A. This was in the morning, yes.

Q. Which Nick?

A. Nick Matula called me back.

Mr. Oles: I object to what Nick Matula may have said.

The Court: Sustained.

By Mr. Hoague:

Q. Without telling what you said, what action did you take?

A. After the conversation with Mr. Matula?

Q. Yes.

A. I said, "I will send down banners in order to protect the man's seniority."

Mr. Oles: I object and I ask the Court to strike the phrase just put in the record.

The Court: The incompleted phrase is stricken.

By Mr. Hoague:

Q. And how many banners did you send down?

A. One.

Q. How did you send them down?

A. With two more business agents.

(Banner marked Defendant's Exhibit No. 14 for identification.)

By Mr. Hoague:

Q. Handing you Defendant's Exhibit No. 14, for iden-
[fol. 140] tification, I ask you to identify it.
A. This is one, or one similar to that, the same wording.
Q. Same wording?
A. Correct.
Q. How many banners with this wording do you have up there?
A. Three.

OFFER IN EVIDENCE

Mr. Hoague: I will offer 14 in evidence.
Mr. Oles: No objection.
The Court: Admitted.

(Whereupon, Defendant's Exhibit No. 14 for identification was received in evidence.)

By Mr. Hoague:

Q. Did you go down to the Lucas Flour Company on May 27th?
A. On the 27th?
Q. Yes; that is Tuesday.
A. No,—

The Court: Counsel, I am a little mixed up as to the dates. You just now asked him if he went down on the 27th, and a few minutes ago I understood that Nick Matula went down, and I thought that was the 27th that Nick Matula went down.

Mr. Hoague: I am asking if he went down. Your answer was that you did not go down on the 27th?

A. No, sir, I did not go down.
Q. What was your purpose in picketing the Lucas Flour Company?
A. A violation of a contract, job seniority protection for our members, that is why they joined the Union.
Q. What significance did Jack's firing, Jack Welsch's firing, have with his pension rights under your Health
[fol. 141] & Welfare?

Mr. Oles: I object to that question.

A. He would have lost—

Mr. Oles: Irrelevant, immaterial.

The Court: You are offering to show the reasonable conduct of the business agent and the good faith in acting with foresight rather than hindsight?

Mr. Hoague: Yes.

The Court: For that purpose I will overrule the objection.

The Witness: Actually, we have a pension set-up for our members and it works the same way as Social Security; the more that the employee pays in, the more pension he receives at the time of retirement. Jack Welsch was going to retire the first of the year, and the least that we could do was see that he got as much pension as possible. He would have lost these rights. It wouldn't have amounted to an awful lot, but every few dollars when a man retires at the age of 65 means an awful lot.

By Mr. Hoague:

Q. Were you ever on the picket line?

A. Yes, sir.

Q. And when was that?

A. This was on a Friday, the Friday following the 27th, being the 30th. If the 30th is Friday, that is the day I was there.

Q. By the way, you sent down one picket banner; did you ever send down any other picket banners?

A. No, sir.

Q. On the 30th did you bring a banner with you?

[fol. 142] A. I had a banner in the car, yes.

Q. You had a banner in the car?

A. Yes, I put one in the car.

Q. So on the 30th there were two banners down there?

A. There were two banners down there, but only one was showing; I had one of them that was in the car.

Q. Will you describe the manner of picketing?

A. It was peaceful picketing. The car was sitting across the tracks and they had a sign hung on the fender of it, this sign that was offered as evidence.

Q. What if anything did you do to stop deliveries?

A. We didn't make any attempt to stop any deliveries. If a Union man pulled in there, possibly the first thing that he would do would be to motion for the guys to come over and ask what the problem was.

Q. What motion; for what guys?

A. Motion for whatever one of the pickets to come over, the picket that was on duty.

Mr. Oles: I ask the witness be instructed to respond to the question, which is "what he did".

The Court: It is easier to keep track if he does answer the question, and you can give him another question.

By Mr. Hoague:

Q. What did you do?

A. I sat in the car.

Q. Did you have any conversation with any of the delivery men?

A. None whatsoever.

The Court: This is still on the 30th?

Mr. Hoague: On the 30th. The only one he can testify to.

[fol. 143] The Witness: That is correct.

Mr. Oles: That being the case, I now move to strike the references to what people did regarding the motions of the pickets over to the truck and the like.

Mr. Hoague: We will withdraw that. I will go along with that.

The Court: All right.

By Mr. Hoague:

Q. Did you give any instructions to the pickets as to their conduct?

A. We advise all the pickets that go on the line to talk to no one, just to explain that there is a labor dispute, not to get in any argument with anyone.

Q. Who was with you on the 30th?

A. I was sitting in the car talking to Jack Welsch.

Q. Was there any other picket there that day?

A. No.

Q. Not another picket?

A. No.

Q. How long were you there?

A. I would say approximately 45 minutes; that is roughly 45 minutes.

Q. Did any truck pull up while you were there?

A. No trucks pulled out, but Lucas pulled out with a station wagon loaded with flour.

Q. What did you do?

A. First of all, they pulled out their big truck, and they took that over to the sugar company and I followed the truck over there. They parked the truck and went back, so I came back to the flour company.

[fol. 144] Q. What was your purpose in following them over to the sugar company?

A. Actually, if they were going to load I was going to picket the truck.

Q. Then what did you do?

A. I came back to the flour company and sat in the car and talked to Jack again. In the meantime they loaded up a station wagon and pulled out and I followed them.

Q. Where did they go to?

A. The first place they went was to the police station. They stopped in front of the police station. I stopped behind the truck and they went into the police station, were in there approximately five minutes, and came out, got in the car and took off in the station wagon. And then the next stop they made was a bakery, I don't recall the name of it. It was off Rainier Avenue. And I pulled up right behind them. They went in the office and talked to the people in the office and I could see the hands flying and finally one of the girls done like this, and she done like this. She motioned me to come in.

Q. Motioned you to come in, one of the girls?

A. Right.

Q. Go on.

A. So I went in and two boys were in there and they were talking with another fellow and a girl.

Q. Two boys?

A. Nick and Pete were in there discussing with the manager, I imagine. She said, "What's the trouble?" And I said,

"No trouble at all. All we have is a labor dispute with the [fol. 145] Lucas Flour Company." With that I turned around and walked out.

Q. Did you have the banner on you when you went in?

A. No, no.

Q. Where was the banner?

A. I had the banner in my hand, I was going to put it on.

Q. You did have it in your hand?

A. Yes.

Q. Then I want you to continue to tell what happened after that.

A. They left there and went to another place, and they went in and talked to them. Then they came back out and got into the truck and started up 12th Avenue and I was behind them. They were traveling approximately 30 miles an hour until they got—

Q. You say "truck"?

A. They were in a station wagon. They were traveling approximately 30 miles an hour until they hit 12th Avenue and they sped up to 50. Then I said, "Well, this isn't worth it. We are going to get in a jam." I couldn't afford a ticket and I figured this wasn't worth it, so I let them go.

Q. Where did you go then?

A. I went back down to the Hall, down to the building.

Q. Down to the Union Hall?

A. Right.

Q. What was your purpose in following the station wagon?

A. I was going to picket the station wagon, the truck.

Q. How many pickets did you assign to the Lucas Flour Company on the first day?

[fol. 146] A. One.

Q. Who is that?

A. Nick Matula.

Q. What about the two men that carried the sign down to him?

A. They took the sign down and came right back.

Q. And in subsequent days how many pickets were assigned?

A. One picket.

Q. Was there any time when you assigned more than one picket?

A. No, sir.

Q. The picket that you assigned, was that in addition to Jack Welsch or not?

A. There was one boy that was picketing and Jack Welsch might have been down there, I am not positive on that. Then Jack took over the picket duty.

Mr. Hoague: No further questions.

Cross examination.

By Mr. Oles:

Q. You say you are not positive that Mr. Welsch was down there. You think he might have been; is that what you just said?

A. I am not positive that he was down there all the time.

Q. All the time. You knew he was down there, didn't you?

A. I knew he was down there Friday.

Q. Friday is the only time that you saw him?

A. That is the only time that I was down there.

Q. Are you quite sure about your times, sure you didn't go down on Tuesday?

[fol. 147] A. Positive.

Q. Wednesday?

A. No, sir.

Q. Thursday?

A. No, sir.

Q. You are sure you went down there Friday?

A. I am positive it was Friday because we were making arrangements so that we could find out who was picketing on Saturday and Sunday.

Q. And you claim they were shipping out, they were on this Friday, took deliveries out to some bakeries?

A. I am positive it was Friday.

Q. These bakeries were open?

A. Yes.

Q. On May 30?

A. If it was Friday, I am quite positive. It may have

been Thursday. I am not positive of the day; it was either Thursday or Friday.

Q. Now, your purpose in following these trucks around was to picket the trucks, was that what you had in mind?

A. That is correct.

Q. Now, when you picket an establishment it is your purpose to advise customers that that establishment has a labor dispute; is that correct?

A. If they ask us, yes.

Q. You don't volunteer the information?

A. No.

Q. You have a sign out there?

A. That is correct.

Q. Your purpose is to advise customers of the establish-
[fol. 148] ment that you have a labor dispute with the owner of the establishment, right?

A. Correct.

Q. So your purpose in picketing a truck is that if there were any customers of that truck, say somebody who wanted to buy the truck, or what do you have in mind?

A. We were picketing the item that was in the truck.

Q. You wanted to give advice to the item that was on the truck that it had a labor dispute with the owner?

A. With Lucas Flour Company.

Q. You wanted to advise the sacks of flour of this?

A. No, people that were buying it.

Q. Your purpose was to advise people who were buying from the Lucas's, right?

A. That we had a labor dispute.

Q. They finally lost you on 12th Avenue at 50 miles an hour?

A. Correct.

Q. Your costs in one of these operations are paid for by the Union, Mr. Anderson?

A. On a speeding ticket, no.

Q. Not on a speeding ticket? So you say you couldn't afford the ticket; you are referring to yourself, I take it?

A. Correct.

Q. The pickets were not to talk to anyone, is that their instructions?

A. Correct, unless they are spoken to first.

Q. You claim that at this first restaurant, for instance, or this first bakery, that some girl waved her hand and [fol. 149] asked you to come in?

A. She motioned for me to come in.

Q. Somebody you knew?

A. No.

Q. She just waved to have you come in?

A. They were standing in there hassling and she was in the middle of it. She could see me standing out there and she could see that I had this thing in my hand and motioned for me to come on in.

Q. Did they leave any deliveries there, Mr. Anderson?

A. No, sir.

Q. Now, you say that one of the purposes of this strike, if I correctly understand you, was to protect Mr. Welsch's retirement rights, is that correct?

A. That is correct; job security.

Q. You have a 65-year-old retirement program, don't you, some kind of a program that becomes payable at 65?

A. Yes, but if they are capable of working, they can keep on working.

Q. Do they have to or can they?

A. They can.

Q. They can work?

A. If they are physically able, yes.

Q. But they can retire under your program at 65, can't they?

A. Yes.

Q. And Mr. Welsh was 68 years old, wasn't he?

A. That is correct. I assume that is correct.

Q. You say you didn't go down to the Lucas Flour Company during the period of this picketing except on Memorial [fol. 150] Day, the 30th of May, 1958, is that correct?

The Court: That is a 1959 calendar.

The Witness: Yes.

Q. It comes on the same day every year?

A. Then it was Thursday.

Q. All right. It was Thursday. That is the only day you went down there, is that correct?

A. That is correct.

Q. And you were there about 45 minutes?

A. Right.

Q. Then you took off following the Lucas people in their station wagon?

A. I followed the truck first, the large truck.

Q. Then the station wagon? Then you say only Mr. Matula went down to picket on the 27th?

A. That is correct.

Q. Mr. Welsch was with him, wasn't he?

A. He went down to work out the problem.

Q. You sent two business agents, but their only purpose was to carry this sign?

A. Only assigned one business agent to take it down and the other guy rode down because he was going on another job.

Q. You don't contend it takes two business agents to carry this sign?

A. No, under no circumstances.

Q. You had a discussion at some time or other on behalf of the Lucas Flour Company regarding paid vacations. When did that conversation take place?

A. I would say approximately three years before this.

[fol. 151] Q. Whom did you talk to at that time?

A. I talked to Nick Lucas and I talked to John on it, and I am not positive whether I talked to Pete Conom or not. I wouldn't say for sure.

Q. Now, you had a previous dispute with the Lucas Flour Company over Mr. Welsch?

A. One time.

Q. And you had previously told them if they didn't rehire him you would close them up?

Mr. Hoague: I don't want to open this up.

Mr. Oles: I don't either.

Mr. Hoague: I don't want to have too much objection, but I don't want to open up the entire history of the relationship between the company and the Union, so I will object for that reason.

The Court: Just a minute here. A few minutes ago you were arguing very violently about urging the Court to let some of these matters come in to show good faith on the

part of Mr. Anderson as an agent or as a human being with certain powers and certain risks and duties. I followed your legal reasoning in that regard over the strenuous objection of Mr. Oles. Now he wants to cross examine on the subject. I assume for the same purpose to rebut this question of good faith, and now you are objecting because—I can't quite follow the refinements here.

Mr. Hoague: I may be wrong, but my thought is I limited my question about discussions about Jack Welsch between the Union and the company to those discussions that were right near the time of the picketing.

[fol. 152] The Court: You went back three years. You asked two or three questions before you went back to the other question so I didn't permit you to go back three years.

Mr. Hoague: Your Honor, I didn't go back three years about any disputes or about his good behavior.

The Court: We have opened up this question of good faith and it is difficult to evaluate how far we should go into it. And the rules do provide a rather wide latitude in cross examination, and it is a rather nebulous subject. I can't draw a hurried line. I think we have to rely on Counsel to keep the Court in proper perspective and I therefore will have to permit further cross examination until it appears to me there has been an abuse of it. You may proceed on.

By Mr. Oles:

Q. You understand the question, Mr. Anderson?

A. You asked me if we had had another dispute and I said "yes" about three years before.

Q. And at that time isn't it a fact that you had told them that either they rehire him at that time or you would close them up?

A. Could I explain why?

Q. I am just asking you at this point the question of whether this isn't a fact.

A. Yes, due to the fact that Jack Welsch wasn't involved in blowing up the truck.

Q. Well, we won't go into who blew up the truck, but now on the subject of your motives, Mr. Anderson, this other

Mr. Anderson whom you claim didn't have much seniority and who was hired by the Lucas Flour Company, this Law-
[fol. 153] rence Anderson, this man is a member of Local 174, wasn't he?

A. That is correct.

Q. And at that time that this event of May 27 and so forth took place, this Lawrence Anderson was one of a group within Local 174 that have brought a suit against you claiming abuse of office and seeking an audit of the Union books; isn't that a fact, Mr. Anderson?

A. That is correct. He was also involved in theft at Safeway.

Mr. Oles: That is all.

Redirect examination.

By Mr. Hoague:

Q. I want to ask you to explain what you meant by "blow up the truck".

A. Sometime, whenever Nick Lucas and Pete Conom took the truck out on a Sunday, they made a delivery in town on a Saturday or Sunday—

Mr. Oles: I object to the continuance of this answer unless there is some evidence that this witness has any knowledge of the events to which he is testifying.

The Witness: I do; I was there.

Mr. Oles: You were on this truck?

The Witness: I was there when the dispute took place.

The Court: I am beginning to believe that what we are getting into is beginning to get too remote.

Mr. Hoague: I don't want to leave any inferences of dynamiting.

[fol. 154] By Mr. Hoague:

Q. The truck burned out a bearing, isn't that right?

A. Yes, they pushed a rod out through the side of the motor. Jack Welsch wasn't driving it; Pete Conom or Nick Lucas was driving the truck at the time they accused him of not putting in oil.

Mr. Oles: There is no question before the witness.

The Court: I hadn't even thought of the word "dynamiting" until somebody used the word a minute ago.

Mr. Oles: By way of information to the Court, all of these areas were exhaustively discussed in arbitration as shown by this transcript of arbitration.

The Court: Nobody offered that document. I don't have it before me. I haven't had occasion to read it and I thought the only thing that was before me was in the file of the Clerk's office which contains the formal order of this Arbitration Board. I don't know the detail evidentiary matters and I assume there are many items and that is probably the reason you haven't offered it.

Mr. Oles: That is right. And if we had to take time out to read the whole document, I think it would take longer than to put in the evidence that deals strictly with this case, as long as we attempt to keep it confined within some reasonable bounds. At least, that is the theory under which I hoped that we could operate.

By Mr. Hoague:

Q. Why did you threaten to tie up the Lucas Flour Company three years before?

A. Pete Conom and Nick Lucas took the truck out and [fol. 155] made a delivery in Seattle, then they went over to North Bend or over to Cle Elum. On the hill someplace they threw a rod out the side of the motor.

Mr. Oles: I object; there is no showing that this witness is competent to answer this question.

The Court: Objection sustained.

By Mr. Hoague:

Q. Did you learn any of this from the Lucas's?

A. They admitted it the following day, when I went down there with Jack the following Monday after they fired him.

Q. What did the Lucas's admit? I am not trying to hedge in on this, your Honor, I just think that we have a right to. They brought up this discharge.

The Court: You have asked him what the Lucas's said. It sounds to me it has to depend on hearsay. Now you are talking about admissions from one of the parties, as I see it.

Mr. Oles: I made no objection.

By Mr. Hoague:

Q. What did the Lucas's admit?

A. They said they were on the truck when the motor blew up, but they contended that it was Jack Welsch's fault because he hadn't checked the oil in the truck. But whenever a driver takes out a truck the first thing he does is check the tires, the oil, the water, the gas. Evidently they hadn't, because the reason that the rod went through the side of the block was because there was no oil in it or they burned out a bearing.

Mr. Hoague: No further questions.

The Court: Just a minute. I would like to ask a question [fol. 156] and I wouldn't be offended if either counsel makes objection to the Court's questions. If you feel you are entitled to a technical objection, I would invite it from either counsel, if he feels it is technically offensive.

Questions by the Court:

Q. I am curious as to whether or not you referred back to your contract with the Lucas Flour Company prior to your taking this strike action against the Lucas Flour Company?

A. I will explain it this way: The reason I wanted to go down there was to sit down with them, try and work this whole thing out. If they would have asked for arbitration, we would have given them arbitration, but they came out definitely and said that the man was fired. We had no alternative but to picket them in order to protect our membership. That is why they pay us.

Q. Apparently I didn't make my question clear. I was curious as to whether as a matter of fact you took a look and read any portions of the contract that the Union has with the Lucas Flour Company before you actually ordered a strike.

A. Yes.

Q. You actually did? Did you take a copy of the contract and read it to refresh your recollection of the contract?

A. No, I know it from memory.

Q. You relied on memory?

A. We have a seniority clause.

Q. At that time did you contact your legal counsel, the attorneys that are hired by your Union membership, that [fol. 157] advise you as to the legal interpretation of the contract?

A. No.

Q. I see.

If the Court's questions have inspired any other question on the part of counsel, you are at liberty to ask any questions you may desire to.

By Mr. Hoague:

Q. What other companies do you have the same contract with, or at that time what other companies did you have the same contract with?

A. We have approximately 465; it could be twenty either way, the same contract with different companies in the City of Seattle.

Q. That was a standard contract?

A. It is a standard contract, yes, sir, private carrier.

Mr. Hoague: You may step down.

Jack Welsch.

(Witness Excused.)

Melvin T. Welsch, called as a witness by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hoague:

Q. Will you state your full name?

A. Melvin T. Welsch.

Q. What is your home address?

A. 413 First Avenue West.

Q. You are called Jack Welsch?

[fol. 158] A. Yes, sir.

Q. What is your occupation?

A. Well, truck driver and warehouseman.

Q. Are you still driving truck?—

A. No, sir; retired.

Q. Were you a member of Local 174?

A. Yes, sir.

Q. How long had you been before this picketing, been a member of Local 174?

A. I transferred over from Spokane I think approximately sixteen years ago.

Q. Had you maintained your membership?

A. Yes, sir.

Q. How long had you worked for Lucas Flour Company?

A. Five years, maybe a little over.

Q. Do you remember what the date was that you came to work?

A. I think it was the last of March.

Q. Last of March?

A. About '53, I believe.

Q. Last of March of 1953. Had you worked continually from that time to the date of your injury?

A. Well, I was injured a couple of times before that, or sick. I was off a little, but otherwise continuous. That is, vacations and other days.

Q. What if any arrangement did you make with the Lucas's about your vacations?

A. I made all my arrangements through John Lucas.

Q. What were those arrangements?

A. I asked John if he wanted me to work my vacation [fol. 159] and he said "yes, he would rather have me work them than to hire some, we will say, green hand that would have to be broken in."

Q. And did you take any vacations in the sense of not working up until 1958?

A. No, sir. I worked all my vacations for five years.

Q. And were paid?

A. Paid.

Q. And for your work, too?

A. For my work and my vacation. I had double checks coming.

Q. Now, were you paid any vacation time in double time in 1958?

A. Yes, sir.
Q. When was that?

Mr. Oles: Your Honor, I am going to object to the continuance of this line of inquiry; it has no relevance or materiality to any facts before this Court.

The Court: The question of the good faith of Mr. Anderson, this Court has permitted to have you put in evidence of that nature; but is there any showing that this information, that this witness is testifying about, was actually conveyed to Mr. Anderson so that it would convey the fact of whether Mr. Anderson was in good faith or not?

Mr. Hoague: I can ask that in another way. On the other hand, your Honor, he is a member, was a member of Local 174 and I suppose his good faith is involved in this, too.

[fol. 160] The Court: That is a thought I hadn't processed through my mind. It didn't seem to me that that was the purpose of your offering this other testimony. Mr. Welsch is not a defendant to this action. It is an action for damages either in tort or in breach of contract, we haven't established it yet. You don't intend to tie this information in to Mr. Anderson's?

Mr. Hoague: Yes, I do.

The Court: I will permit the line of questions to proceed then, with the understanding that you will tie in the matters which he is offering here to show that Mr. Anderson became aware of these matters and for the purpose of dealing with and bearing upon the issue of Mr. Anderson's good faith.

Mr. Oles: If that is in issue.

The Court: At the moment we are considering it to support their theory. Whether it is an issue that will have any bearing in the case, I am not ruling at this time, but I am attempting to permit evidence to come in in the theory of the defendant at this point.

By Mr. Hoague:

Q. Were you paid any vacation time in 1958, Mr. Welsch?
A. Yes, sir.
Q. When was that paid?
A. Well, they gave me a double check the first part of April. Let's see, yes, April the 1st. The first part of April,

instead of paying the two weeks that I had coming, vacation, they gave me one and they said—John told me I would [fol. 161] have to wait a couple of weeks until they had a little more money to pay me the other. Of course, that is all right.

Q. When was your year up for which this double vacation pay was due?

A. Last of March, as I recollect; the first of April, to be sure of.

Q. Did you have an accident on May 12th?

A. Yes, sir.

Q. And as a result of that accident what did you do?

A. I went home.

Q. Went home. Were you under a doctor's care?

A. Crawled up the stairs.

Q. Were you under a doctor's care?

A. Yes, sir, two weeks.

Q. During those two weeks, did you have any conversation with the Lucas Flour Company?

A. Myself, no; my wife did.

Q. Were you there when she had the conversation?

A. No, I was not. I wasn't able to get around.

Q. At any rate, what was the result of the conversation between your wife and the Flour Company?

A. I think most of the conversation was with John Lucas.

Q. We can't go into that, Mr. Welsch. What happened as a result of that? First she talked to him on the phone. Then what happened?

A. Want me to hurry up and get well and come back to work.

Q. Did you receive any further check?

A. Yes.

Q. What was that?

[fol. 162] A. I took and had my wife call them up and ask for my second vacation check. That was on Friday. Let's see, yes, Friday, the 23rd, I think it was, and he said, "All right. Come on down," and they would give it to her. So the neighbor lady took my wife down and they gave her an envelope with a check in it, also a note.

Q. I will hand you Defendant's Exhibit 13 and ask you if that is a copy of the note that you received?

A. Outside of Pete's signature, yes, that is the reading of it.

Mr. Hoague: Will you stipulate that Pete Conom signed Defendant's Exhibit 13?

Mr. Oles: Yes, the original of which that is a copy.

By Mr. Hoague:

Q. What did you do after you received that note?

A. I got in my car and went over to the Union and showed it to Rus Anderson.

Q. What did you tell Rus at that time?

A. I just showed him the note and he said, "What do you think of this?" I said, "I am ready to go back to work. The doctor has cleared me for work. I am ready to go back to work." And I told him the doctor would give me a written release Monday so I was able to work Tuesday, Tuesday morning.

Q. What if any explanation did you make to Rus Anderson about your vacation?

A. Well, I said I already had my vacation and there was no more vacation coming to me.

[fol. 163] Q. When was it that you went over there, was that the same day you received the check?

A. The same day I received the check.

Q. Did you go to the Lucas Flour Company that day?

A. No, sir.

Q. And what did Rus Anderson do?

A. Rus said he would call them, which he did.

Q. Did you get a written release from the doctor?

A. On Monday, yes.

Q. You got it from the doctor on Monday?

A. From the doctor on Monday.

Q. What did you do with the written release?

A. When I got the release I thought as long as I had the release I would go down and see Lucas myself. So I went down. Pete Conom was there and I handed him the note. And I said, "What do you mean by that?" He said, "You take this week off and if we are busy next week, we will call you." I said, "That don't go with me. I have got seniority." And I said, "I will take it up with the Union." So I went

back to the Union, to Rus Anderson. I gave him the note, also showed him the doctor's release.

Q. Did you explain what Pete Conom had told you?

A. Yes, sir.

Q. To Rus Anderson?

A. Take that week off and if they are busy, the next week, they would call me.

Q. And did he make a telephone call?

A. Who is that?

Q. Rus Anderson.

[fol. 164] A. Yes, sir.

Q. Do you know who he called?

A. Whoever was down there. I paid no attention to whoever he was talking to.

Q. Down where?

A. Lucas Flour.

Q. What did you do on Tuesday?

A. Well, on Monday—

Q. Excuse me. On Monday did you receive any information that you were being discharged?

A. No, sir.

Q. Did Pete Conom say anything about a discharge when you talked to him?

A. No, sir.

Q. Did Rus Anderson talk to you about a discharge?

A. No, sir.

Q. Now, the next morning, what happened?

A. On Monday morning?

Q. Yes. No, Tuesday morning.

A. Well, Rus told me to be at the hall Tuesday morning and he would go down with me to thresh it out. But Rus couldn't go so he sent Nick Matula?

Q. Did you ride down with Nick Matula?

A. No, I took my own car, ready for work with my working clothes.

Q. I want you to tell just what happened when you and Nick went into the Lucas Flour Company.

A. We went in, went upstairs, Nick was sitting at his desk.

Q. That is Nick Lucas?

[fol. 165] A. Nick Lucas. Nick Matula went over and asked him what the deal was. Nick Lucas didn't make any bones about it. He says, "As of this morning Jack Welsch is fired." That is on the 27th. That is the first I knew that I was fired.

Q. Any more conversation?

A. And Nick asked him for what reason I was fired. And he said, "For unsatisfactory work." May I go on?

Q. Yes.

A. Why, if my work—

Q. Oh, no, you can't go on.

A. That is what I wanted. What I asked. I just wanted to show my work wasn't unsatisfactory. By their own words.

Q. What if anything was said by Nick Matula in protest or argument?

A. There was no argument. He asked if he could use the phone and Nick Lucas didn't even answer. Matula went over and used the phone, regardless, I guess you might say. No argument about it. And he called the hall.

Q. What did he say?

A. He said he couldn't come to an agreement, that I was fired as of that morning, Nick Lucas had fired me.

Q. Now, shortly after that did the picket sign arrive?

A. The picket sign arrived about, oh, half, three-quarters of an hour after that.

Q. What did you do with the picket sign?

A. I think Nick put it on.

Q. Put it on his person?

A. Put it on his person.

[fol. 166] Q. How many signs were there?

A. One.

Q. And what did Nick do when he had the sign on?

A. He was over across the tracks from the warehouse. We were over across the tracks.

Q. Who was?

A. We all were.

Q. Who is "we all"?

A. There was Nick and there was a couple of fellows in the car that brought it down, and myself.

Q. How long did those fellows that brought it down stay around?

A. Not very long. They had a job to go on; they just come down and took off.

Q. And Nick stayed there how long that day, Nick Matula?

A. Not very long. He called for another man to take his place. He had been up all night. The Union sent down another man.

Q. I want you to describe for the Court how this picket operated.

A. Well, we were across the track on railroad property that was practically, oh, say, 50 feet from their warehouse, on railroad property. And the banner was laid over the fender, the left fender of the car.

Q. I thought it was on Nick Matula.

A. He took it off. He didn't want to keep it on. And he put it on the fender. And anybody coming up or down the alley, they would see the banner.

Q. Did you stop—what steps did you take to stop any deliveries being made?

[fol. 167] A. We didn't stop any of them, as far as I know.

Q. How long were you there picketing, Mr. Welsch?

A. I picketed after, by myself, I think from Saturday—first Saturday following until the end, outside of when Nick and Rus took and would relieve me. They would come down in the morning, like on a Saturday and Sunday, they'd come down at 7:00 or 7:30 and I relieved them at 11:00 and stayed until 5:00.

Q. Incidentally, was Rus Anderson down there on May 27th at any time at the Lucas Flour Company?

A. No, not to my knowledge.

Q. What did you do, what conversations did you have while you were picketing there with the men on the railroad cars?

A. I was sitting in my car when the switch come up there and stopped. The head brakeman come over to me and he asked me, "What do you want to do with these cars, where do you want us to put them?" "Put them there, they ain't bothering us any."

Q. What conversations did you have with any other deliverers, truck deliverers?

A. Anybody asked us, we tell them it was a labor dispute.

Q. Did you ever speak to anybody without—
A. Myself, no.

Mr. Oles: I don't know what that last question and answer was. The question isn't finished and the answer is incomprehensible. I wonder if you could try that again.
Mr. Hoague: All right. I will try it again.

By Mr. Hoague:

Q. Did you ever go up and talk to any deliverers unless [fol. 168] they questioned you?
A. I did not.
Q. Do you know whether any of the other pickets did?
A. I see pickets go over and talk to them when they wanted to know, when they called them over.
Q. When they would call them?
A. Yes.
Q. What if anything did you ever say to any deliverer about not delivering goods?
A. I don't recall I said anything to any delivery. The only one I ever spoke to was the head switchman switching in and he come to my car. I didn't even get out of my car.
Q. By the way, do you know when Lawrence Anderson was hired at the Lucas Flour Company?
A. Oh, a couple of weeks before I was hurt. They were supposed to put three men to work down there and that is why I figured they got him as a third man.
Q. Do you know whether he had ever worked for Lucas Flour Company before this?
A. I don't think so.
Q. He hadn't while you were there?
A. No.

Mr. Hoague: No further questions.

Cross examination.

By Mr. Oles:

Q. Mr. Welsch, you have testified that you went in to see Rus Anderson on Friday, the 23rd of May, and that he said

that he would look into it or try to thresh this out with [fol. 169] the Lucas Company?

A. He said, "I will call them up."

Q. Well, isn't it a fact, Mr. Welsch, that what he told you is "I will see that you go back to work"?

A. No, sir.

(Transcript of Proceedings marked Plaintiff's Exhibit No. 15 for identification.)

By Mr. Oles:

Q. Now, Mr. Welsch, isn't it a fact that you testified in an arbitration proceeding before three arbitrators whose names are Walter Briem, Hugh Pickel, and Harry Margolis?

A. Yes, sir.

Q. And isn't it a fact that you then testified that you were asked about what Mr. Anderson told you and you made this reply, and I refer to page 121 of proposed Exhibit 15:—

Mr. Hoague: What line?

Mr. Oles: 12.

By Mr. Oles:

Q. Isn't it a fact that you then stated as follows:

"Rus Anderson told me to come back at 7:00 o'clock on Tuesday morning; that they would go down and see that I went to work."

Did you ever make that statement?

A. He said for me—

Mr. Hoague: I object to this question because this is not impeaching. I asked him about the Friday conversation.

By Mr. Oles:

Q. Maybe that is the explanation. Is this some other conversation?

[fol. 170] A. We had two conversations, as far as that is concerned.

Q. Did he ever tell you that he would go down and see that you went to work?

A. He said he would go down—what I heard him say over the phone—he would go down and thresh it out.

Q. Did he ever say "I will go down to the Lucas Flour Company and see that you go back to work?"

A. No, sir, not that I know of; not to my recollection, he didn't.

Mr. Oles: Are you satisfied, Mr. Hoague?

Mr. Hoague: I think you have got the poor man confused.

The Court: You can have a chance to ask him questions on redirect. We are not going to change the rules. You can straighten it out if there is anything confusing.

By Mr. Oles:

Q. Now, Mr. Welsch, you went down there Tuesday morning, but with Nick Matula rather than Rus Anderson, is that correct?

A. I also went down Monday morning.

Q. But you went down Tuesday to Lucas Flour Company?

A. Yes, sir, and also Monday morning.

Q. You went to Lucas Flour Company Monday, but I am asking whether you went down on Tuesday and you went with Mr. Matula; this is correct?

A. Yes, sir.

Q. And I think you just testified that Mr. Matula went with you to see Mr. Lucas and Mr. Conom, is that right?

A. Not Mr. Conom, Mr. Conom wasn't there.

Q. Nick Lucas?

[fol. 171] A. That's right.

Q. And Mr. Matula, I think you testified, said "What is going on here," or words to that effect?

A. Words to that effect, "What is the rumpus," or why I would have to take this other week and if they were busy the next week they would call me. He wanted to know about it. They wanted information about it.

Q. Now, isn't it a fact that Mr. Matula instead went in with you and said to Mr. Nick Lucas, "Here is Jack Welsch; he has come down here to go back to work."

A. After, what you call it?

Q. After what?

A. He did say that, yes.

Q. He did say that?

A. Yes, I will admit that. I think he said, "Jack Welsch is ready to go to work this morning. He has his doctor's release."

Q. You claim there was some other conversation between Mr. Matula and Mr. Lucas?

A. Very little that I know of.

Q. Very little?

A. The exact words I can't recollect; that is quite a while ago.

OFFER IN EVIDENCE

Mr. Oles: I think probably for whatever purpose it may serve, we are going to offer Exhibit 15, which is the stenographic transcript of the proceedings of the arbitration, your Honor.

Mr. Hoague: I object to that because there are a great many matters that are dealt with there that are irrelevant to this case, that are hearsay, that are opinion. The rules [fol. 172] of evidence were completely ignored, as is the procedure in arbitration proceedings, and it is certainly not right to have this transcript in. Furthermore, I object to it as hearsay.

Mr. Oles: In that connection, if you are through making your objection, I would like to say that the hearings were conducted by Mr. Harry Margolis and were conducted with a scrupulous regard for all the rules of evidence throughout. Objections were made and sustained at various points in the evidence and Mr. Hoague wasn't there so he wouldn't know. But counsel were representing both sides and the matter was conducted in a highly judicial manner.

The Court: It seems to me that the plaintiff is entitled to have this admitted for the purpose of attempting to prove matters he wishes to impeach him on which refers to the question that was put to the witness relative to page 121.

The Court will only consider those portions of the transcript specifically brought out by counsel and upon a showing that portions to be considered by the Court are relevant and germane to the issues in the case. At this point I will consider only page 121 as germane; and for whatever purpose it may have bearing upon the impeachment and only for impeachment and not to prove matters asserted in this transcript, unless specifically pointed out to the Court. At this time it is only offered for this limited purpose and I will admit it for that purpose alone.

(Whereupon, Plaintiff's Exhibit No. 15 for identification [fol. 173] was received in evidence.)

Mr. Oles: That is all we ask at this time.

The Court: You will have to point out what page and line will have a bearing in this case.

Mr. Hoague: I do want to object on the ground that this is hearsay.

The Court: Well, all such depositions are hearsay, but it is for the limited purpose. Hearsay documents are permitted for the sake of impeachment.

It is time for the morning recess. We will take our usual recess at this time.

(Recess.)

The Court: You may proceed.

By Mr. Oles:

Q. Mr. Welsch, you had had complaints about your work from the Lucas Flour Company, hadn't you?

A. Complaints?

Q. Complaints about your work?

A. Yes.

Mr. Oles: I have no further questions.

Mr. Hoague: No further questions.

The Court: You may step down.

Mr. Hoague: Mr. Matula.

NICK MATULA, called as a witness by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hoague:

Q. Will you state your name and home address?
[fol. 174] A. Nicholas Matula.
Q. How do you spell that?
A. M-a-t-u-l-a.
Q. And your home address?
A. 2806 South 288th, Auburn, Washington.
Q. On May 27th what was your occupation?
A. Business agent.
Q. 1958?
A. Business agent, Local 174.
Q. Did you have a conversation on May 27th, 1958 with Rus Anderson?
A. Yes.
Q. When was the conversation? What time of day?
A. Well, I would say approximately 7:45 a.m., 7:40.
Q. Was it in person or over the phone?
A. In person.
Q. What did he tell you?
A. He asked me on my way home if I would stop at the Lucas Flour Company with Mr. Welsch and see what the problem was.
Q. You say on your way home. What had you been doing?
A. Well, as Mr. Anderson testified, we had a problem with Safeway Stores. I am going to have to tell the story. I had been on the phone all night due to this Safeway problem.
Q. Down at the Union Hall?
A. Right. So the next morning Mr. Anderson came in and I seen him talking to Mr. Welsch. He then asked me on the way home to stop by the Lucas Flour Company and see what the problem was regarding Mr. Welsch.
[fol. 175] Q. What did you do?
A. I says, "Fine, I will stop by there."
Q. And?

A. I drove my car and Mr. Welsch drove his. I arrived at the Lucas Flour Company approximately 8:00 a.m. I introduced myself to Mr. Nick Lucas and I asked him what the problem was regarding Mr. Welsch. Mr. Lucas informed me that Mr. Welsch was fired as of this morning. I then asked Mr. Lucas for what reason. He stated "Unsatisfactory work."

Q. What was his manner?

Mr. Oles: I object to that question, your Honor. I don't know what Mr. Lucas' manner has to do with this case.

The Court: Overruled.

A. (Continuing) I then asked—

By Mr. Hoague:

Q. What was Nick Lucas' manner?

A. Well, it was a little gruff in the way he worded it. I wouldn't say,—just rough, about the only way I can say. "He is fired as of this morning."

Q. What did you say after that?

A. I then asked Mr. Lucas if I could use his telephone.

Q. What did he say?

A. Mr. Lucas didn't say anything. So then I assumed it was okay to use the phone. I then proceeded to call Mr. Anderson at the Teamsters' Building. I stated to Mr. Anderson the exact words that Mr. Lucas stated to me, that Mr. Welsch had been fired as of this morning for unsatisfactory work.

Q. All right. Now, as a result of that conversation, what [fol. 176] happened?

A. Mr. Anderson said to me—

Q. You are not allowed to say what he said to you.

Mr. Oles: Well, I haven't objected.

By Mr. Hoague:

Q. What did Mr. Anderson say?

A. This was a telephone conversation. Mr. Anderson said to me that "We will have to tie the place up." I said, "Fine and dandy, send me down a picket banner."

Q. And did he send you a picket banner?

A. Yes, the picket banner arrived, I would say, in approximately thirty minutes.

Q. How many picket banners?

A. I received one picket banner.

Q. Were there any other banners there?

A. Not that I know of.

Q. What did you do with the banner?

A. I put it on, I wore it, walked in front of the place for a while. I sat in my car for a while.

Q. Where was your car located?

A. The car was located on the east, or on the west side of the track on Homer Street.

Q. The tracks run north and south there?

A. Yes.

Q. How long did you stay there?

A. I stayed there until about 1:30 p.m.

Q. On that day what happened at 1:30 p.m.?

A. A replacement came down. Then I proceeded to go on home and to bed.

Q. What conversations did you have with any deliverers while you were there that day?

[fol. 177] A. I didn't have any conversation with any deliveries that day. I had fellows drive by, make some comment, and go on by.

Q. Did you talk to them at all?

A. No, I might have said to one or two of them, "We have a labor problem."

Q. Did you speak to them until they spoke to you?

A. Oh, no, they speak first; that is always the policy in the picket line.

Q. What action did you take to stop any deliveries?

A. Can't stop any deliveries. Anyone has a right to go through picket lines if they so wish.

Q. What requests, if any, did you make to them not to go through the picket line?

A. None.

Q. How many days were you on that picket line?

A. Oh, let's see, it was that one day and then I went down there on a Sunday morning at 7:00 a.m., and then Mr. Welsch came down later on and replaced me for the afternoon shift.

Q. So you were only there on two days?

A. Parts of two days, that is correct.

Q. On that Sunday morning that you were down there, will you describe how you picketed?

A. Sat in the car that morning. There was nobody around.

Q. Where was the banner when you sat in the car?

A. I had the banner in the car.

Q. Inside the car? Did you see any—on those two occasions that you were there did you see Mr. Welsch or any [fol. 178] other Union representative stopping any deliveries?

A. No.

Q. Was Rus Anderson at the plant, the Lucas Flour Company, on May 27 as far as you know?

A. Not to my knowledge, no.

Q. Was there ever more than one banner at the Lucas Flour Company, picket banner, while you were there?

A. No.

Q. How long did the two men who brought the banner on the first day, how long did they stay there?

A. Couldn't have been more than ten minutes.

Q. On that day were any other pickets there other than you and Welsch?

A. No, I was the only one picketing while I was there.

Q. Where was Mr. Welsch while you were there?

A. Sitting in his car and sometimes he would talk to me.

Mr. Hoague: No further questions.

Cross examination.

By Mr. Oles:

Q. Mr. Matula, when you went into the office and talked to Nick Lucas on the morning of the 27th of May, did you speak to him on the subject of seniority rights?

A. No, sir.

Q. Had Mr. Anderson asked you to speak of the subject of seniority rights?

A. No, sir.

Q. Did you at any time in your conversation with Mr. Anderson, when he asked you to stop by, discuss with him seniority rights?

[fol. 179] A. No, sir.

Q. When you called him and told him what Mr. Lucas said did he speak at all about seniority rights?

A. No.

Q. Did you, when you talked to Mr. Lucas, mention any arbitration of the dispute?

A. Did Mr. Lucas mention—

Q. Was it mentioned in the conversation between yourself and Mr. Lucas?

A. No, I testified about my conversation with Mr. Lucas.

Q. And did you in your conversation with Mr. Anderson discuss arbitration?

A. No.

Q. Now, Mr. Matula, how long have you been a member of the Teamsters' Union?

A. Oh, roughly, twenty years.

Q. And Local 174, does that include truck drivers in this area?

A. Yes.

Q. How many of them?

A. This time of year, it is a rough estimate, but I would say fifty-four, fifty-five hundred members.

Q. Most of those are, or perhaps all are drivers of trucks who might be making deliveries to this plant, were members of Local 174?

A. No.

Q. Were any of them?

A. Could have been.

Q. Did you recognize any?

A. No.

[fol. 180] Q. There are other Teamster locals that have truck driver members in this area?

A. That is right, and I might say, I don't know if I should—

Q. Are they affiliated with Joint Council 28?

A. That is correct.

Q. And at that time Local 174 was affiliated with Joint Council 28, is that correct?

A. That is correct.

Q. And that is, essentially that is the Washington State organization of Teamsters, is that correct?

A. Joint Council 28 covers the State of Washington, that is correct.

Q. And all these truck drivers, or practically all of them were members of the International Brotherhood of Teamsters?

A. That I could not answer, because they could have been non-union drivers.

Q. Could have been?

A. Certainly.

Q. Very few in the City of Seattle?

A. I think there is a number.

Q. Well, by a number, what do you mean?

A. Well, I couldn't give you an absolute number.

Q. A small percentage of the employed truck drivers in this community, isn't it a fact?

A. I would say that is pretty close, yes.

Q. Now, you say and I quote you, "Anyone has a right to go through a picket line if he so wishes." Now, Mr. Matula, is this the practice of the Teamsters' Union mem- [fol. 181] bers, to go through a picket line?

A. To go through a picket line?

Q. Yes, by the Teamsters' Union.

A. No, it is not a practice.

Q. On the contrary, the practice is that members of the Teamsters' Union do not go through Teamsters' Union picket lines, isn't that a fact?

A. Yes. Of course, there are exceptions.

Q. What happens to those exceptions, Mr. Matula?

Mr. Hoague: I think the question has to be a little more explicit than that. Name your exception and ask the question.

Mr. Oles: If he doesn't know, he can always say he doesn't know.

The Court: That doesn't call for a general answer, necessarily; if he doesn't know, I will overrule the objection. He can answer if he knows.

A. Well, I can give you an example, as far as going through a picket line. I had to go through one myself and it happens, certainly, and we know that at times members go through picket lines.

Q. You have disciplinary proceedings in the Union, do you not, for members of the Local who go through the Local's picket line?

A. I have never been involved in one.

Q. That isn't the question. You do have disciplinary proceedings, don't you?

A. In our by-laws, I do not think so, I would have to check. I couldn't actually give you an honest answer, because I don't know.

[fol. 182] Q. In any event, it doesn't happen very often?

A. It happens.

Q. It doesn't happen very often, does it?

A. No.

Mr. Oles: I have no further questions.

Mr. Hoague: No further questions.

The Court: You may step down.

DEFENDANT RESTS

Mr. Hoague: The defendant rests.

Mr. Oles: We will recall Mr. Nick Lucas, if we may sir.

NICK LUCAS, recalled as a witness by and on behalf of the Plaintiff, having been previously duly sworn, was examined and testified in rebuttal as follows:

Direct examination.

By Mr. Oles:

Q. Mr. Lucas, you are the same Nick Lucas who earlier testified and was sworn in this case, is that correct?

A. Yes, sir.

Mr. Oles: I would like, if I may, your Honor, to preface this question and this inquiry, which will not be extensive, by saying to the Court that we don't wish to be held to have waived our objections to the whole line of inquiry that we made earlier by rebutting one aspect of it at this time and this is surely by way of rebuttal in view of the testimony having been offered.

The Court: This won't hold you to it. You have a duty to proceed along with the theory of the Court's ruling and [fol. 183] I don't think you have waived your objection. I can't speak for what some other forum might do.

Mr. Oles: I understand that, your Honor.

By Mr. Oles:

Q. Did you have a conversation by telephone with Mr. Floyd Anderson, commonly known as Rus Anderson, preceding the 27th of May, immediately preceding the 27th of May, pertaining to the discharge of Mr. Welsch?

A. Yes, I found a note on my desk Monday afternoon in the office to call Mr. Floyd Anderson from the Union. So I called him.

Q. Would you state what occurred, what was said on each side of that telephone conversation, to the best of your recollection?

A. He asked me—he says "How come you are not hiring Jack Welsch back or take him back to work?" Something close to it. And I said, "No, we don't want Jack back to work." I mentioned that Jack has been discharged. And he says, "Well, I'll see you tomorrow morning. I am coming down tomorrow morning." And I said, "For what reason?" And these were his exact words, "To tie up your joint." And that was the end of the conversation until Tuesday morning when Mr. Nick Matula and Jack Welsch came to the office at 8:00 a.m.

Q. Did you have any conversation with Mr. Anderson, that is Floyd Anderson, relative to the new employee, the relatively new employee, Mr. Anderson?

A. Yes, he asked me, "You have somebody else working at your place as warehouseman?" I said, "Yes." He asked [fol. 184] me what was his name and I refused to answer. "Why do you want to know?" And he says, "I know whom you have." I asked him, "If you know, why ask me?" He says, "It is Lawrence Anderson." And he asked me if I knew what trouble he had in the past with some other company, and I said, "No." He says, "I want you to know that he is not a paid-up member with the Union and if he is going to try to pay up his dues, we are not going to accept it." And he said some more things, "You have to live with them," and so forth.

Q. You mean have to live with Mr. Welsch?

A. Mr. Lawrence Anderson. After the telephone conversation was over, I went to Mr. Anderson and asked him, "Are you a paid-up member with the Union? Because we

have to know. We hire Union members." And he pulled his Union book from his pocket and he was paid three months in advance, and that was the end of it.

Q. You testified that on the 27th of May, the first day of the strike, that Mr. Rus Anderson, or Floyd Anderson, as he is variously called in this record, followed you when you attempted to make a delivery?

A. Yes, sir.

Q. Now, are you certain it was on that day?

A. Yes, the first thing we did Tuesday morning is take our truck from the loading platform to the sugar company. That was Tuesday, so we had room to load our cars; that is why I remember distinctly it was Tuesday. And he followed us to the sugar company.

Q. I think you have testified to the rest. I am not asking [fol. 185] you to review it.

Mr. Oles: I have no further questions.

Mr. Hoague: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Oles: That is all I have, your Honor.

The Court: Any rebuttal?

Mr. Hoague: I think I will put on Floyd Anderson for one question.

FLOYD ANDERSON, recalled as a witness by and on behalf of the Defendant, being previously duly sworn, was examined and testified in surrebuttal as follows:

Direct examination.

By Mr. Hoague:

Q. This May 26th telephone conversation, Mr. Anderson, when you talked about Lawrence Anderson, what if anything did you say about his being paid up in dues?

A. There was nothing said about being paid up in dues. He asked me if he wasn't a member in good standing and I said as long as he has paid in his dues, definitely.

Q. Do you know whether he was paid up?
A. No, I wouldn't know unless I took his card out.

Mr. Hoague: No further questions.
Mr. Oles: That is all.
The Court: You may step down.

(Witness excused.)

[fol. 186] The Court: Are you through with the evidence now? Would you like to take a recess and argue at 1:30 or would you argue right now?

Mr. Oles: I had just as well get under way, your Honor, but whatever is satisfactory to all concerned here.

The Court: Well, if either counsel desires to have a slightly longer recess to prepare for argument, I will not be adverse to consider such a motion.

Mr. Hoague: I would appreciate it, your Honor.

The Court: If on the other hand both of you desire to proceed with the argument, I will accommodate you both in that regard.

Would you just as soon recess now?

All right, we will recess now until 1:30.

(Whereupon, a recess was taken until 1:30 o'clock P.M.)

[fol. 187] AFTERNOON SESSION

March 17, 1959
1:30 o'clock P.M.

The Court: You may proceed.

(Whereupon, arguments were made to the Court by respective counsel.)

The Court: I am going to take this matter under advisement. I need to do some more research and digest some of it. You can expect a memorandum within, say, two weeks.

Mr. Oles: Thank you, your Honor.

Mr. Hoague: Thank you, your Honor.

(Whereupon, court was adjourned at 3:30 o'clock P.M., March 17, 1959.)

[fol. 188]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 521982

LUCAS FLOUR COMPANY, a Washington corporation,
Plaintiff,

vs.

NUGENT LAPOMA; JOHN DOE I; JOHN DOE II; JOHN DOE III; LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, Defendants.

Messrs. Allen, DeGarmo & Leedy, attorneys for Plaintiff; and

Messrs. MacDonald, Hoague & Bayless, attorneys for Defendants.

MEMORANDUM DECISION—April 9, 1959

This was an action tried to the court without jury wherein the plaintiff Lucas Flour Company seeks $13,725.48 damages against Local 174 for losses alleged to have been suffered as a result of wrongful interference with the Lucas Flour Company's business. The original complaint, filed on May 27, 1958, not only sought damages for wrongful interference with Plaintiff's business, but also sought an injunction to compel the defendant Local to cease and desist the alleged interference, which consisted of picketing and other related acts allegedly interfering wrongfully with plaintiff's business.

A large portion of the issues raised by the original pleadings have been resolved by two proceedings which were culminated prior to this court's trial upon the merits of the remaining issues. Most of the original controversial [fol. 189] issues of fact and questions of law have merged into two documents contained in the file. One is the order by another department of this court dated June 4, 1958.

The other document is the award of the arbitrators, dated November 7, 1958, which includes as a part thereof the record of arbitration, dated September 11, 1958.

The order of June 4, 1958, makes a determination that the defendant union sought arbitration under the contract which existed between the plaintiff and the defendant and that the plaintiff corporation had not at that time agreed in good faith to arbitrate. This order enjoined the defendant union from picketing and other related acts, but further provided that, if arbitration did not proceed in good faith, the injunction could be dissolved within two weeks.

It is clear from the voluntary approval of the parties to the record of arbitration that the parties intended to be bound by the results of the arbitration irrespective of whether or not the parties were bound to engage in such arbitration proceedings by their original agreement. Arbitration proceeded and after long and extensive hearings where evidence was presented by both parties with the aid of their very able and experienced counsel, an award was made on November 7, 1958. The award was signed by two of the three members. The third member (designated by the defendant union) did not sign in the dissent.

On December 9, 1958, the plaintiff filed its second amended complaint in order to bring the pleadings in conformity with the plaintiff's understanding of the arbitration award. In the second amended complaint the plaintiff seeks damage against the defendant union in the sum of [fol. 190] $4,781.20, together with interest at 6% from June 4, 1958, and the additional sum of $1,156.38, with interest at 6% from November 7, 1958. At the commencement of the trial, the plaintiff amended its complaint, making a total claim against the defendant of $13,725.48.

The case was presented to this court on the basis that the facts found by the arbitrators and set forth in the award of arbitrators are binding and conclusive upon this court. No evidence was offered by the respective parties to contradict the facts found by the arbitrators nor was there any argument directed against the conclusions of law made by the arbitrators. There were two issues submitted to this court under the evidence and by the parties

as they conducted the trial before this department. One issue is whether or not the unlawful picketing in the name of the defendant union was excusable under the facts and circumstances as revealed by the record and the evidence, and, two, if the picketing and related activities of the defendant union were not justified, whether or not the defendant sustained monetary damages of the nature and type permitting redress in the form of a money judgment and if so, what was the amount of the damages in terms of money.

The other issues raised by plaintiff's second amended complaint have long since become moot. When the defendant union affirmatively sought the arbitration proceedings and persistently and voluntarily participated in same and agreed to be bound thereby, the intention of the defendant union to refrain from picketing or any similar activities in this matter became clear. There was no evidence presented to this court to indicate that the union has the [fol. 191] slightest intention of pursuing this conduct any further and it has made it clear that it considers itself bound by the record of arbitration. The record of arbitration was entered on November 7, 1958, almost five months ago. No exceptions have been taken thereto nor was there any dissent signed.

A brief resume of the pivotal facts having been determined by the previous proceedings are as follows: The plaintiff corporation is a closely held family organization in the business of distributing flour primarily to commercial accounts such as large commercial bakeries in Seattle and outlying communities and to a limited extent to some neighboring cities such as Tacoma. The product distributed is a commercial grade of flour and is manufactured according to specifications so that the quality of the product is not a factor in the development of plaintiff's business. The main factor involved in plaintiff's business is service, with particular reference to being able to maintain a constant and dependable supply to its customers. Plaintiff's business can only be developed and expanded by virtue of the plaintiff giving consistently better service over a period of time to its customers.

A representative of the defendant union caused a picket line to be formed in front of plaintiff's premises for the period from May 27 to June 4, 1958. The picket line was dissolved sometime on June 4, 1958, the date of the restraining order. The picketing was essentially a one-man picket. However, the efforts of the one-man picket were on occasion supplemented by other activities. Reference to the arbitration award will reveal the extent and nature of the supplemental activities. Suffice it to say, these [fol. 192] activities effectively curtailed the plaintiff's business and brought it to a virtual standstill.

The picketing was for the purpose of compelling the plaintiff to rehire one of its employees, Mr. Welsch, a union member. It was the plaintiff's contention that the purpose of the picketing was unlawful in that the employer had the right, under the labor union contract, to discharge this particular employee. The defendant union took the position that it was a legal purpose to compel the rehiring of this particular employee because the employer had no right to fire him under the circumstances. It was the union's position that the employer was not in fact discharging the employee because of unsatisfactory workmanship but for another illegal purpose. The arbitration award resolved this issue. For the convenience of reference, the court sets out verbatim the two crucial findings of fact made by the arbitration board, as follows:

"(1) That the work of Melvin T. Welsch was unsatisfactory prior to his discharge, in that he failed to carry out his prescribed duties of keeping the warehouse clean and rotating the stock of merchandise; during his absences due to illness, he failed to notify the employer as to the reasons or when he expected to return; and failed to exercise proper care in the operation of a fork lift truck, by starting the same while it was in gear and causing it to fall a distance of four feet from the warehouse floor to the railroad siding, thereby endangering his life and causing extensive damage to the truck.

[fol. 193] (2) That such unsatisfactory work was the reason for Melvin T. Welsch's discharge on May 27, 1958."

At the start of this trial, the question of wrongful picketing had been determined in favor of the plaintiff so that the plaintiff had only the burden of proving damages which were the proximate result of the wrongful picketing. The defendant union, in recognition of this situation in which it found itself, successfully persuaded this court to consider evidence, which, to some extent, duplicated the area covered by the arbitration board. The defendant union was permitted to put on considerable evidence, over the violent and strenuous objection of plaintiff, in support of defendant's affirmative defense. The defendant contends in its affirmative defense that, even though the picketing on behalf of the union was illegal, the union's agent was justified by reason of the surrounding facts and circumstances to believe that the motive of the plaintiff in firing Welsch was improper. It was the defendant's position that the plaintiff's conduct was such as to lead the union representative to believe that Welsch was fired as a ruse to avoid complying with the seniority provisions in the contract between the plaintiff and the defendant.

In order to evaluate the defendant's claim that the representative of the union was acting in good faith in placing pickets about the business of the plaintiff, the court, of necessity, had to review some of the detailed evidentiary facts contained in the arbitration award and to evaluate them along with the evidence received during this trial.

The services furnished by this corporation are highly [fol. 194] personal and are involved in a strong competitive area. It is a small family operation which employs two, and at times three, persons in addition to the corporate officers and the office staff. These persons consist of one truck driver and one or two warehousemen. The driver and warehousemen are and have been members of Teamsters Union Local No. 174 with which union Lucas Flour Company has a working agreement. Melvin T. Welsch was employed by this firm for a period of about five years up to May 27, 1958, when he was discharged. During the first two or three years of his employment he worked as a truck driver, and the remainder of his employment was served out as a warehouseman.

The employer, over a period of two years or more, had some considerable dissatisfaction with Mr. Welsch's services, particularly during the period that he was a truck driver. On at least one occasion the employer's dissatisfaction rose to such a point that it had actually fired Mr. Welsch, but reinstated him after a union representative had informed the employer, "we were going to have to tie them up". That incident was during the time Mr. Welsch was still working as a truck driver and occurred more than two years ago. On several other occasions, subsequent to that incident and prior to May, 1958, the employer was dissuaded from discharging Welsch because of the threat of economic sanctions by the union. The testimony before the board with reference to these threats by members of the union is, in the main, disputed by the union, but the board found that the employer felt, and with justification, that if it had brought about Welsch's discharge, such action would not be without incident.

During the latter portion of his employment as a ware-[fol. 195] houseman, Mr. Welsch was deficient in his duties which included keeping the warehouse clean and rotating the stock so that there would be no accumulation of stale merchandise. The employer attempted to correct him in these respects but to no avail. He was also absent from work due to illness on a number of occasions and failed to notify the employer as to the reasons or when he would return. This caused the employer considerable inconvenience since it was difficult to determine whether a replacement should be hired and for how long.

Prior to about May 1, 1958, the employer did not use fork lift trucks. Around that date the employer moved into a new warehouse and decided to use that type of mechanized equipment. Before the move, an officer of the employer telephoned a representative of the union and expressed some doubt as to whether Welsch would be able to handle a fork lift truck. This doubt was based in part on the fact that Welsch was 68 years of age and had never handled such equipment. The union representative assured the employer that Welsch would work out all right, and the employer accepted that assurance, although somewhat reluctantly.

On May 12, 1958, at about 8:00 o'clock in the morning, Welsch boarded one of the fork lift trucks for the purpose of moving it away from the doorway of the new warehouse so that a truck could be backed up to the doorway and loaded. The fork lift truck had been parked facing the doorway. Outside the doorway there was a four-foot drop to the railroad siding. Welsch's intention was to back the fork lift truck away and park it in another part of the warehouse. Instead, he started the electric motor of the [fol. 196] fork lift truck while it was in forward gear, and the vehicle moved out of the doorway and fell to the siding four feet below with Welsch still aboard. As a result of this accident, Welsch sustained some injuries necessitating medical treatment and the truck was rather extensively damaged.

Welsch immediately took off work to obtain medical care and recover from his injuries. The employer did not fire him on the spot, partly because he was not there and partly because of the employer's indecision as to the course of action which should be taken.

Welsch was entitled to two weeks' vacation with pay, but he had been accustomed to working the full 52 weeks of the year (except for time off because of illness) and drawing double pay for two weeks. One week of vacation pay had been given him in April, 1958. He received no pay for the week ending Friday, May 16, 1958, because he was off work due to his injuries. On Friday, May 23, 1958, the employer delivered to him, while he was still off work, a check for the second week of vacation, together with a note suggesting that he take the following week off. This would have been without pay, since by then he had received his two weeks of vacation pay. By this time, the employer had definitely decided to fire Welsch, but had not quite determined how to go about it. On May 26th Welsch returned to the warehouse for the first time since his injury two weeks before. He wanted to go to work and had a doctor's certificate stating that he was then able to return to his job, but the employer still temporized and insisted on the one week layoff without pay. Welsch was unhappy with the layoff and accordingly reported back to the union. That same day, Monday, May 26th, a

[fol. 197] representative of the union and the employer conferred by telephone. There is quite a dispute in the record as to who said what, but on the following morning the union business agent called upon the employer.

That morning, Tuesday, May 27th, the business agent was informed by the employer's representative that Welsch was fired as of then, giving "unsatisfactory work" as the reason. As far as the record shows, this was the first indication by the employer to anyone, following the accident of May 12th, that Welsch was discharged. Immediately following the discharge, the union stationed pickets at the employer's place of business.

This union affords to its members a pension plan for eligible union men who have reached a retirement age, which is age 65, and who no longer desire to engage in regular gainful employment. On or about September 1, 1958, a little more than three months after his discharge, Welsch applied for his pension. The arbitration board observed that such action on the part of Welsch was an indication of his lack of intention to return to work and made his status moot as of September 1, 1958.

The employer was undecisive in its attitude toward Welsch and did not take a firm stand with reference to Welsch's unsatisfactory workmanship. This controversy would not have assumed its present proportions if the employer had taken a firm stand immediately after the accident and fired Welsch forthwith. It was difficult for the union, in rallying to the assistance of one of its members, to comprehend why the employer would want to postpone the day of reckoning by giving Welsch an additional one week "layoff" if his work was unsatisfactory [fol. 198] to the point of necessitating his permanent separation from employment.

An evaluation of the above resume of the facts before this department sharpens the first issue before the court and can be rephrased thusly: Does the inexpert handling of the discharge of Welsch by the employer, when weighed in light of the facts and circumstances, constitute legal justification for the illegal picketing of plaintiff's place of business by an agent of the defendant union?

The evidence reveals that the picketing was the result of the single decision by a Mr. Russell Anderson, who, at the time of the trial, was the president of the union local, but, at the time of this incident, held an office of lessor importance. Mr. Anderson's decision to picket was made on the morning of May 27th, following a phone call from one of his subordinates, a Mr. Matula. Mr. Matula had been directed by Mr. Anderson to go to the employer's place of business on that morning. Mr. Matula, after a brief conversation with representatives of the employer, became convinced that the employer would not rehire Mr. Welsch. Upon Mr. Matula becoming so convinced, he borrowed the employer's telephone and called Mr. Anderson at the union hall. He reported the fact to Mr. Anderson that the employer had no intention of rehiring Mr. Welsch. Mr. Anderson then forthwith sent two men down with a picket sign, which sign was delivered to Mr. Matula. Mr. Matula wore that sign for the remainder of the morning until he was relieved by another picket.

Mr. Anderson's decision to picket the place of business, of course, was based on his earlier considerations and analysis of the situation as revealed to him in his dis-
[fol. 199] cussions with Mr. Welsch on days previous.

There is nothing in the record to indicate that Mr. Anderson obtained the approval of or consulted with a strike committee of the union or conferred with any other officer or members of its executive committee or any other agency on behalf of the union. There is nothing in the record to indicate that Mr. Anderson sought the advice of the retained attorneys rendering legal services to this particular union. Mr. Anderson advised the court that he did not consider it necessary to himself review and reread the contract between the union and the employer. In spite of the fact that Mr. Anderson acted singularly and on his own initiative entirely, the union has not disputed, and did not dispute at the trial, its responsibility for the acts and conduct of Mr. Anderson. For all practical intents and purposes the question becomes, not did this 5500 member union act in good faith, but, did Mr. Anderson act in good faith and have reason to justify his placing pickets and engaging in other related conduct?

It would appear from the available evidence as a whole that Mr. Anderson had a firm fixation and a long standing personal determination that Mr. Welsch was going to remain in the employ of the plaintiff.

Certain facts must have been known by Mr. Anderson or should have been known by Mr. Anderson at the time he made this decision immediately following the phone call from his subordinate, Mr. Matula. There is nothing in the record before this court, nor was there anything in the record before the arbitration board, to suggest that the employer was anti-union or that Mr. Welsch was being discriminated against or that the employer had ulterior [fol. 200] designs in bringing about the final termination. To the contrary, Mr. Anderson knew, or should have known, of the long-standing employer dissatisfaction with Mr. Welsch. Similarly, he knew, or should have known, of the reasons for this dissatisfaction.

Mr. Anderson had extreme confidence in his recollection as to the contents and interpretations of the union contract. Therefore it is only reasonable to assume that Mr. Anderson was aware of the many provisions in the contract which would protect Mr. Welsch from any economic loss in the event the discharge were wrongful.

Mr. Anderson testified that his purpose in stationing pickets was to stop the violation of the contract. It was his testimony that he had then the thought in mind that the job seniority provision with reference to layoffs was being violated. He testified that this affected Mr. Welsch's retirement pension and that Mr. Welsch would retire at the age 65 and only needed a short period of employment to get him his full pension benefits.

Later on it developed that Mr. Anderson knew that Mr. Welsch was three years past the retirement age and that he was possessed of this knowledge at the time of the incident in question. The record contains other testimony which is significant as to what was the actual state of Mr. Anderson's mind at the time of the commencement of the picketing. Mr. Matula, who was sent by Mr. Anderson to discuss the problem with the employer, stated on cross-examination that at no time did Mr. Anderson speak to him upon the subject of seniority rights. Mr. Matula stated

that he did not speak to the employer about the subject of seniority rights. It is rather clear from Mr. Matula's testimony that Mr. Matula's only instructions were to at-
[fol. 201] tempt to force the re-employment of Mr. Welsch. If Mr. Anderson actually in fact was possessed of the fear that seniority rights were being offended, why did he not explain them to Mr. Matula prior to sending Mr. Matula on such an important errand having such far-reaching consequences?

Mr. Anderson took an amazing amount of interest in the success of this picketing for one having such a prominent office. He actually took the picket line. In addition to taking the picket line himself personally, he took it upon himself to follow representatives of the employer when they attempted to make deliveries to various of their customers. He seemed to have a tremendous personal concern for the success of this project.

When one contemplates the entire record binding upon this court in light of the testimony actually heard, a portion of which has been outlined above in this memorandum, this court cannot help but come to the conclusion that the defendant has failed to sustain its burden of proof. Considering all of the factors, including the demeanor of the various witnesses on the witness stand, their apparent candor and lack of candor, and the reasonableness of the stories that are related, the evidence preponderates in favor of the plaintiff's position that Mr. Anderson was not motivated by, nor did he even believe that he was attempting to enforce compliance with the seniority provision of the contract or any other provision of the contract.

Mr. Anderson was motivated by something other than the union's mutual aid and protection. The contract between the employer and the union, which contract was
[fol. 202] drafted by the union itself, clearly shows that the union does not regard it to be one of its purposes to compel the retention of an inadequate, incompetent employee in a job that would be dangerous to the employee himself and to the property and lives of other persons working in the vicinity of the incompetent employee. The board of arbitration, in interpreting the contract between the employer and the union, held that the right of dis-

charge is preserved in a case where the man's services are not satisfactory to his employer but that the right must be invoked reasonably and in good faith. With this interpretation, the court agrees. Therefore it follows that the union has disclaimed as one of its objects and purposes the right to compel an employer to keep on in the employment a man whose services are not satisfactory to the employer, provided the employer is acting reasonably and in good faith.

Since the court is obliged to find that the defendant union has failed to produce evidence of sufficient weight to satisfy the burden of proof, it is concluded that the defendant union is liable for all damages which can be established as being reasonably certain and proximately caused by the conduct of Mr. Anderson. We will therefore now examine plaintiff's evidence with reference to damages.

We have here an action predicated upon the fact, which has been now determined, that the defendant is responsible for the acts of one of its employees. This employee's act constitutes wrongful interference with the business of another, which wrongful interference was not justified by acts and conduct of the person offended. Plaintiff has the burden of proving, by a fair preponderance of the evidence, [fol. 203] each and every element of the damage claimed and each element must be established to have been proximately caused by these wrongful acts of defendant's agent with reasonable certainty. It is not a requirement that the plaintiff prove each element of damage by absolute certainty, but it must be proved by something more than mere speculation or conjecture.

The evidence fairly preponderates in favor of the proposition that the plaintiff has had a substantial reduction in its gross sales and that this reduction in gross sales was proximately caused by the acts of the defendant's agent. It is impossible to ascertain the exact amount of these damages with mathematical certainty. It is extremely difficult, if not impossible, to specifically identify any particular item as being solely and proximately caused by the acts of defendant's agent. The evidence preponderates in favor of the proposition that the loss sustained by the

plaintiff is in excess of a nominal amount. The problem and difficulty arise in attempting to ascertain at what point above a nominal sum the evidence preponderates with a reasonably certainty.

The court is not convinced that the evidence preponderates with reasonable certainty in favor of plaintiff's contention that failure of the business to show an increase percentagewise after May 1958 was proximately caused by the wrongful acts of the defendant's agent. The amount argued for by the plaintiff has at least one other reasonable explanation. The failure of the business to continue increasing over the corresponding month of the previous year could reasonably have been caused by a natural and normal levelling off process. For several months prior to May of 1958 the sales were increasing at a decreasing [fol. 204] rate. The largest gross sales were in August of 1957 and the largest percentage of increase was in October of 1957. The argument of the defendant union is well taken upon this point.

The fact that the court rejects the plaintiff's theory as to the extent of damages does not relieve the court from evaluating the evidence to see if any other basis exists upon which damages can be predicated other than a nominal sum.

The fair preponderance of the evidence establishes with reasonable certainty that, were it not for the wrongful acts of defendant's agent, the plaintiff's business would have been at least equal to the corresponding month of the previous year for the months subsequent to May 1958. Therefore, any decrease in gross sales for any month subsequent to May of 1958, below that of the corresponding month of the previous year, is chargeable to the defendant. There is no explanation other than the picketing to explain the abnormal decline for the months from July 1958 through January 1959, inclusive.

The practical common sense logic supports this legal conclusion when one considers the high regard in which the overwhelming majority of the general public holds unions in this community. To accuse an employer of being unfair to unions creates in the minds of a substantial portion of the general public an antagonism which can

never be erased so far as some persons are concerned and will require months to minimize in the minds of others. This fact, coupled with the peculiar nature of the plaintiff's business, which involves a matter of personal service to its customers and a reputation for reliability of delivery, goes to point up the reasonableness of concluding that the drop in gross sales after May 1958 was a [fol. 205] direct and proximate result of the unauthorized acts of the union's representative. The difference between the gross receipts for the eight months from June 1958 through January 1959 and those of the corresponding months of the previous year is $70,424.08. The plaintiff's figure of 9% for an adjusted gross profit on sales seems to be well within the range of what could be expected under the evidence of this case. Multiplying the lost gross sales of $70,424.08 by 9%, the sum of $6,338.17 is computed to be the amount of general damages, which can be established as well within the range of reasonable certainty. The items set forth on Exhibit 9 under the schedule Itemized Damages are also established with reasonable certainty except for the items of $2,037.19 entitled "operating expense" and $370.00 entitled "lost profits". Except for these two items of "operating expense" and "lost profits", plaintiff would be entitled to a judgment for all of the other items under the schedule set forth as Exhibit 9. The reason the court eliminates from Exhibit 9 the items of "operating expense" and "lost profits" is because the court is of the view that it has not been established with reasonable certainty, by the preponderance of the evidence, that these two items are separate and in addition to the item of lost profit of $6,338.17 computed by the court's method.

The court is unable to recollect by what authority the plaintiff believes it is entitled to be awarded claim for the expenses of arbitration as set forth in Paragraph IX of plaintiff's second amended complaint. It would appear to the court that the common law does not afford to plaintiff any right to such recovery and unless it is a subject [fol. 206] matter of some agreement, the court would be obliged to deny plaintiff's application for these items. If it be a matter contained in the original agreement between

the parties, or if it be contained in the agreement relative to the arbitration procedure or if it inheres therein, the plaintiff should point such fact out to the court by letter so that the court may evaluate same and rule on its legal sufficiency.

Dated this 9th day of April, 1959.

Raymond Royal, Judge.

[fol. 207]

[File endorsement omitted]

CERTIFICATE

State of Washington)
: ss.
County of King)

I, Raymond Royal, one of the Judges of the Superior Court of the State of Washington in and for the County of King, and the Judge before whom the foregoing cause was tried, do hereby certify that the matters and proceedings contained in the foregoing Statement of Facts are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein; and I do further certify that the same contains all the material facts, matters and proceedings heretofore occurring in said cause and not already made a part of the record therein.

I do further certify that the foregoing Statement of Facts contains all the evidence and testimony introduced upon the trial of said cause, together with all objections and exceptions made and taken to the admission or exclusion of testimony or evidence, and all motions, offers to prove, stipulations and admissions upon the trial of said cause; and that the exhibits hereto attached are all the exhibits admitted in evidence or offered and refused during the trial of said cause.

Done in Open Court this 21st day of October, 1959.

Raymond Royal, Judge.

[fol. 208] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 521982

LUCAS FLOUR COMPANY, a Washington corporation, Plaintiff,

v.

NUGENT LAPOMA; JOHN DOE I; JOHN DOE II; JOHN DOE III; LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, Defendants.

Messrs. Allen, DeGarmo & Leedy, Attorneys for Plaintiff; and

Messrs. MacDonald, Hoague & Bayless, Attorneys for Defendants.

MEMORANDUM DECISION RELATIVE TO DEFENDANTS' MOTION FOR DISMISSAL AND PROPOSED FINDINGS OF FACT—July 13, 1959

Subsequent to the presentation of proposed findings of fact, conclusions of law and decree by the parties, the court has been favored by various briefs and memorandums of authority. The court has reviewed all of these documents together with the authorities cited therein, as well as the authorities furnished to the court on previous occasions. As a result of these deliberations the court holds the following views:

The defendant teamster union challenges the contentions of the plaintiff in two principal areas:

1. That plaintiff's proposed findings of fact should contain additional facts;

2. That the court does not have jurisdiction to enter a judgment against this union because the tortious conduct

of the union's business agent is within the purview of the [fol. 209] Taft-Hartley Act and thus the union is protected and immune from suit.

The items which the defendant union would add to the proposed findings generally are detailed evidentiary items from which the union's attorneys argued that the business agent acted in good faith and should thereby be excused from responding in money damages for the private wrong done. Findings normally do not include detailed evidentiary items. The ultimate fact found by the court is all that is appropriate.

The court is of the view that the tortious conduct of the defendants' agent for which the defendant union admits responsibility is not of the type from which it is protected from suit. In order to be protected under the federal law the wrongful activity must be of such a nature that a reasonable argument can be made that it may be assumed to be covered by the Taft-Hartley Act. It is recognized, as contended for by the defendant teamster union, that the Taft-Hartley Act affords much protection to labor unions as a national policy. However, it appears clear that it does not give to unions an absolute immunity from having to respond in damages for private wrongs.

Even though a private citizen is virtually denied access to any court to gain redress for a wrong inflicted upon him by a union protected under the Taft-Hartley Act, there still remains some limited areas in which the people may gain relief from their constitutionally established courts, both state and federal.

There would appear to be four situations where a state may give relief to a person for a private wrong arising out of labor activity: (1) The activity is marked by violence and imminent threats to the public order; (2) it cannot be "argued" that the conduct "may fairly be assumed" to be intended to be included within the compass of Sections 7 or 8 of the act; (3) even though the argument in situation (2) above can be made, the National Labor Relations [fol. 210] Board has made a "clear determination" that an activity is neither protected nor prohibited; (4) even though the argument in situation (2) above can be made, there exists a "compelling precedent" applied to "essentially undisputed facts".

From the very beginning of the trial the facts were essentially undisputed. Most of them were developed during an arbitration proceeding. Some evidence was presented by both sides during the trial which was cumulative. The court ruled in favor of the defendant union and permitted other evidence in support of the union's claim of good faith by Mr. Anderson. This was over the violent objection of the plaintiff.

There has been no dispute that the plaintiff had a right to discharge the employee because of incompetency and other justified reasons. The employee was a hazard to life and safety of everyone around him, including himself. The employer's dissatisfaction had long been known to the union. It was only the fear of sanctions that caused the employer to keep the man on for the two years prior to the near fatal accident.

No one ever has disputed that this union in its contract has disclaimed any right to interfere with the discharge of an unsatisfactory employee done in good faith.

It has never been contended by anyone to this court that "mutual aid or protection" of a union is furthered by picketing an employer to force him to rehire an incompetent employee dangerous to himself and fellow employees. The argument which the evidence permits the defendant union to direct itself is not one to the effect that the activity of Mr. Anderson was for "mutual aid or protection" of Teamster Local 174.

This court does not believe that any federal law excuses the Superior Court of this State from giving redress for the wrong inflicted as proved by the evidence. Now that [fol. 211] the court is satisfied as to its jurisdiction to proceed, the hearing relative to the settlement of the findings of fact, conclusions of law and decree can be resumed. Please make arrangements with this department's bailiff for a mutually agreeable date.

Dated at Seattle this 13th day of July, 1959.

Raymond Royal, Judge.

[fol. 212] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING
No. 521982

LUCAS FLOUR COMPANY, Plaintiff,

vs.

LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, Defendant.

MOTION FOR DISMISSAL NOTWITHSTANDING COURT'S MEMORANDUM DECISION—Filed July 13, 1959

Comes now the defendant and moves this Court to dismiss the complaint herein with prejudice notwithstanding the Court's oral opinion for the reason that the defendant's activities for which the Court would award damages are under the exclusive control of the national Labor Management Relations Act and that this Court has no jurisdiction of this action. *Building Trades Council* vs. *Gorman*, U.S. Supreme Court opinion rendered on April 20, 1959; *Local 298* vs. *County of Door*, U. S. Supreme Court opinion rendered May 4, 1959 and other cases cited in defendant's Memorandum of Authorities point IV.

MacDonald, Hoague & Bayless, Attorneys for the Defendant.

[Handwritten notation—Copy rec'd May 7, 1959—Allen, DeGarmo & Leedy—attys. for plaintiff.]

[fol. 213]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 521982

LUCAS FLOUR COMPANY, Plaintiff,

vs.

LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, Defendant.

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

July 16, 1959
Offered and refused this date.
Raymond Royal, Judge.

This Cause came on regularly for trial before the undersigned Judge of the above-entitled Court the 16th day of March, 1959, the Court sitting without a jury, and the trial proceeded that day and on the following day. Plaintiff appeared by and through its attorneys, Allen, DeGarmo & Leedy, and the defendant Local 174, Teamsters, Chauffeurs & Helpers of America (hereafter called Local 174) appeared by and through its attorneys, MacDonald, Hoague & Bayless. Plaintiff at commencement of trial moved to amend its Second Amended Complaint as more fully set forth in its Notice of Trial Amendment herein, and there being no objection said motion was granted. All defendants save Local 174 were, without objection, dismissed from the action without prejudice. The Court heard and considered the opening statements, testimony, stipulations, evidence, and arguments adduced by counsel; thereafter both parties rested, and the Court took the cause under advisement. Thereafter on April 9, 1959 the Court filed herein its Memorandum Decision. Having considered the files and records herein together with matters presented at trial and

being fully advised in the premises, the Court now makes the following

Findings of Fact

I.

Plaintiff is and at all times relevant hereto was a corporation of the State of Washington, engaged in the whole-[fol. 214] sale distribution of flour, with its principal place of business located in Seattle, Washington. Plaintiff has paid all license fees and taxes due the State of Washington. Plaintiff purchases approximately $400,000.00 worth of flour and like products from without the State of Washington each year, which represents approximately 60% of plaintiff's annual purchases of such products.

II.

Defendant Local 174, Teamsters, Chauffeurs & Helpers of America, hereinafter called Local 174, is and at all times relevant hereto was an unincorporated association and a labor union with its principal offices located in Seattle, King County, Washington.

III.

Plaintiff employs, and at all times relevant hereto has employed, in King County, State of Washington, certain individuals who are or were during their employment members of Local 174. The terms of employment of said individuals are, and at all times relevant hereto were, prescribed by an agreement between plaintiff and Local 174, which agreement was effective from and after April 1, 1955 and during all times pertinent hereto. A subsequent agreement was entered into between said parties, which however is identical to the agreement effective April 1, 1955 for all purposes pertinent to this action. Each party to this action has a copy of said agreement, which was drafted by Local 174, and which contains, among others, the following provisions:

Article II

The Employer reserves the right to discharge any man in his employ if his work is not satisfactory.

Article VI

Seniority shall prevail in layoffs for all employees after three (3) months' service. In the event of a layoff, the last employee hired shall be the first layed off.

Article X

All regular employees shall be guaranteed a full week's [fol. 215] work.

Article XIV

Should any difference as to the true interpretation of this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said members cannot agree, a third member, who must be a disinterested party shall be selected, and the decision of the said Board of Arbitration shall be binding. It is further agreed by both parties hereto that during such arbitration, there shall be no suspension of work.

Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding.

If any employee is removed from service for any doubtful cause, he shall have a fair and impartial investigation within three days. If found guilty, he shall suffer the penalty, and if not, he shall be paid for his time off at the regular scale of wages.

IV.

The plaintiff corporation is a closely held family organization in the business of distributing flour primarily

to commercial accounts such as large commercial bakeries in Seattle and outlying communities and to a limited extent to some neighboring cities such as Tacoma. The product distributed is a commercial grade of flour and is manufactured according to specifications so that the quality of the product is not a factor in the development of plaintiff's business. The main factor involved in plaintiff's business is service, with particular reference to being able to maintain a constant and dependable supply to its customers. Plaintiff's business can only be developed and expanded by virtue of the plaintiff giving consistently better service over a period of time to its customers.

V.

Floyd Anderson, also known as Russ Anderson, Vice-President and a business agent of the defendant union, caused a picket line to be formed in front of plaintiff's premises for the period from May 27 to June 4, 1958. The [fol. 216] picket line was dissolved sometime on June 4, 1958, pursuant to restraining order issued herein on that date. The picketing was essentially a one-man picket, which involved no violence or threat of violence. The picketing was manned by defendant's union officials and members including Mr. Welsch. In addition to the picketing there were three or four isolated occasions when a union picketer followed plaintiff's truck for a short distance. No violence or threat of violence was involved in such activities. These activities effectively curtailed the plaintiff's business and brought it to a virtual standstill. The picketing was for the purpose of compelling the plaintiff to rehire one of its employees, Mr. Welsch, a union member.

VI.

On May 12, 1958 Mr. Welsch, while in the employ of the plaintiff, started the electric motor of a forklift truck while it was in forward gear, and as a result the vehicle moved out of the plaintiff's doorway and fell to the siding four feet below with Welsch still aboard. As a result of this accident Welsch sustained some injuries necessitating medical treatment, and the truck was rather extensively dam-

aged. Welsch immediately took off work to obtain medical care and recover from his injuries. The employer did not fire him on the spot, partly because he was not there and partly because of the employer's indecision as to the course of action which should be taken.

Welsch was entitled to two weeks' vacation with pay, but he had been accustomed to working the full fifty-two weeks of the year (except for time off because of illness) and drawing double pay for two weeks. One week of vacation pay had been given him in April 1958. He was entitled to receive the second week's vacation pay by the end of April 1958, the anniversary of his original employment.

[fol. 217]

VII.

On Friday, May 23, 1958, plaintiff delivered to Welsch, while he was still off work a check for the second week of vacation, together with a note stating as follows:

Memo from Nick Lucas — 5-23-58

Jack:

The enclosed check covers your second week of vacation. We have decided that it would be better to take next week off for part of your vacation and than [then] should we be busy the following week I will call you, otherwise take the second week of your vacation and rest.

[signed] Pete

This would have constituted a layoff without pay. By this time the plaintiff had definitely decided to fire Welsch, but had not quite determined how to go about it. This determination of the plaintiff was not communicated to the defendant or to Welsch until the morning of May 27. On May 26 Welsch returned to the plaintiff's warehouse for the first time since his injury. He wanted to go to work and had a doctor's certificate stating that he was able to return to his job, but the plaintiff still temporized and insisted on the one week layoff without pay. That same

day, May 26, a representative of the defendant and the plaintiff conferred by telephone. There is a dispute in the record as to who said what, but still plaintiff did not state to the defendant or to Welsch that he was being discharged for unsatisfactory work.

VIII.

On the morning of May 27 Russ Anderson sent a Business Agent to the plaintiff's plant with Welsch to see whether plaintiff could be prevailed upon to put Welsch to work. At the outset of the meeting plaintiff told Welsch and the Business Agent that Welsch was discharged, and when asked what for replied "For unsatisfactory work". Thereupon the Business Agent reported this fact to Russ Anderson by telephone and Mr. Anderson forthwith sent [fol. 218] two men down with a picket sign which picket sign was delivered to the Business Agent who wore the sign for the remainder of the morning until relieved by another picket.

IX.

From a time a week or so prior to Welsch's accident and all during his sick leave and layoff period plaintiff had in its employ to do the same work as Welsch was doing an employee with less than one month's seniority. This employee was continued on by the plaintiff at least through the period of picketing and for all it appears through to the time of this trial. This fact was known to the defendant on May 26 and 27.

X.

The layoff announcement contained in the above quoted note was in violation of the above quoted seniority provision. The note indicated that Welsch was going to be put to work at some time in the future. The defendant's indecision in discharging Welsch and in indicating that he was merely being laid off, led the defendant to believe that plaintiff's abrupt announcement on May 27 that plaintiff was discharging Welsch for unsatisfactory work was merely a ruse to hide this violation.

XI.

Defendant's motive and purpose in setting up and maintaining the picket line was to force the plaintiff to put Welsch to work and thereby to comply with the seniority provision. There is no evidence that either plaintiff or defendant sought arbitration of this matter until June 4, 1958 after the issuance of the temporary order enjoining the picketing *pendente lite*.

XII.

After the issuance of the injunction the parties agreed to arbitrate the issue of the discharge of Mr. Welsch. Arbitration proceeded and the parties agreed to be bound by the results thereof (irrespective of whether or not the parties were bound to engage in such arbitration pro- [fol. 219] ceedings by their contract). After long and extensive hearings where evidence was presented by both parties, an award was made on November 7, 1958. Said award provided as follows:

"Findings of Fact

1. That the work of Melvin T. Welsch was unsatisfactory prior to his discharge, in that he failed to carry out his prescribed duties of keeping the warehouse clean and rotating the stock of merchandise; during his absence due to illness, he failed to notify the employer as to the reasons or when he expected to return) and failed to exercise proper care in the operation of a fork-lift truck, by starting the same while it was in gear and causing it to fall a distance of four feet from the warehouse floor to the railroad siding, thereby endangering his life and causing extensive damage to the truck.

2. That such unsatisfactory work was the reason for Melvin T. Welsch's discharge on May 27, 1958.

The Board now enters the following

CONCLUSION OF LAW

That Melvin T. Welsch is not entitled to be reinstated in his former employment with Lucas Flour Company.

AWARD

The Board hereby orders that the discharge of Melvin T. Welsch on May 27, 1958, was justified and that he is not entitled to reinstatement with his former employer, Lucas Flour Company."

From the Foregoing Findings of Fact the Court Makes the Following

Conclusions of Law

I.

Plaintiff is an employer engaged in a business substantially affecting interstate commerce.

II.

The acts of defendant in picketing plaintiff's place of business were at least arguably subject to Section 7 or Section 8 of the Labor Management Relations Act, and [fol. 220] therefore this Court is without jurisdiction to issue an injunction or to award damages as prayed for by the plaintiff.

III.

Defendant's purpose either to enforce the terms of the seniority agreement or to have Mr. Welsch re-employed constituted activity for the mutual aid and protection of the union and its members and therefore constituted a justification for the picketing regardless of whether Mr. Welsch's discharge was justified.

IV.

Defendant's peaceful picketing was an exercise of freedom of speech and is protected by the Constitution of the

State of Washington and by the Constitution of the United States of America.

V.

The complaint should be dismissed and the defendant should recover its costs.

Done in Open Court this ..... day of May, 1959.

.....
Judge

Presented by: Francis Hoague, Of Counsel to the Defendant.

Copy rec'd May 7, 1959, Allen, DeGarmo & Leedy.

[fol. 221] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING
No. 521982

LUCAS FLOUR COMPANY, a Washington corporation, Plaintiff,

—vs—

LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—July 16, 1959

This Cause came on regularly for trial before the undersigned Judge of the above-entitled Court the 16th day of March, 1959, the Court sitting without a jury, and the trial proceeded that day and on the following day. Plaintiff appeared by and through its attorneys, Allen, DeGarmo & Leedy, and the defendant Local 174, Teamsters, Chauffeurs & Helpers of America (hereafter called Local

174) appeared by and through its attorneys, MacDonald, Hoague & Bayless. Plaintiff at commencement of trial moved to amend its Second Amended Complaint as more fully set forth in its Notice of Trial Amendment herein, and there being no objection said motion was granted. All defendants save Local 174 were, without objection, dismissed from the action without prejudice. The Court heard [fol. 222] and considered the opening statements, testimony, stipulations, evidence, and arguments adduced by counsel; thereafter both parties rested, and the Court took the cause under advisement. Thereafter on April 9, 1959 the Court filed herein its Memorandum Decision. Having considered the files and records herein together with matters presented at trial and being fully advised in the premises, the Court now makes the following

Findings of Fact

I.

Plaintiff is and at all times relevant hereto was a corporation of the State of Washington, engaged in the wholesale distribution of flour, with its principal place of business located in Seattle, Washington. Plaintiff has paid all license fees and taxes due the State of Washington. Plaintiff purchases approximately $400,000.00 worth of flour and like products from without the State of Washington each year, which represents approximately 60% of plaintiff's annual purchases of such products.

II.

Defendant Local 174, Teamsters, Chauffeurs & Helpers of America, hereinafter called Local 174, is and at all times relevant hereto was an unincorporated association and a labor union with its principal offices located in Seattle, King County, Washington.

[fol. 223]

III.

Plaintiff employs, and at all times relevant hereto has employed, in King County, State of Washington, certain individuals who are or were during their employment mem-

bers of Local 174. The terms of employment of said individuals are, and at all times relevant hereto were, prescribed by an agreement between plaintiff and Local 174, which agreement was effective from and after April 1, 1955 and during all times pertinent hereto. A subsequent agreement was entered into between said parties, which however is identical to the agreement effective April 1, 1955 for all purposes pertinent to this action. Each party to this action has a copy of said agreement, which was drafted by Local 174, and which contains, among others, the following provisions:

"ARTICLE II

The Employer reserves the right to discharge any man in his employ if his work is not satisfactory.

ARTICLE XIV

Should any difference as to the true interpretation of this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said members cannot agree, a third member, who must be a disinterested party shall be selected, and the decision of the said Board of Arbitration shall be binding. It is further agreed by both parties hereto that during such arbitration, there shall be no suspension of work.

[fol. 224] Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding.

If any employee is removed from service for any doubtful cause, he shall have a fair and impartial investigation within three days. If found guilty, he shall suffer the penalty, and if not, he shall be paid for his time off at the regular scale of wages."

IV.

The plaintiff corporation is a closely held family organization in the business of distributing flour primarily to commercial accounts such as large commercial bakeries in Seattle and outlying communities and to a limited extent to some neighboring cities such as Tacoma. The product distributed is a commercial grade of flour and is manufactured according to specifications so that the quality of the product is not a factor in the development of plaintiff's business. The main factor involved in plaintiff's business is service, with particular reference to being able to maintain a constant and dependable supply to its customers. Plaintiff's business can only be developed and expanded by virtue of the plaintiff giving consistently better service over a period of time to its customers.

V.

Floyd Anderson, also known as Russ Anderson, Vice-President and a business agent of the defendant union, caused a picket line to be formed in front of plaintiff's premises for the period from May 27 to June 4, 1958. The [fol. 225] picket line was dissolved sometime on June 4, 1958, pursuant to restraining order issued herein on that date. The picketing was essentially a one-man picket. However, the efforts of the one-man picket were on occasion supplemented by other activities. These activities effectively curtailed the plaintiff's business and brought it to a virtual standstill. The picketing was for the purpose of compelling the plaintiff to rehire one of its employees, Mr. Welsch, a union member.

VI.

Pursuant to aforesaid contract between the parties, the parties agreed to arbitrate the issue of the discharge of Mr. Welsch. Arbitration proceeded and the parties agreed to be bound by the results thereof (irrespective of whether or not the parties were bound to engage in such arbitration proceedings by their contract). After long and extensive hearings where evidence was presented by both

parties, an award was made on November 7, 1958. Said award provided as follows:

"FINDINGS OF FACT

1. That the work of Melvin T. Welsch was unsatisfactory prior to his discharge, in that he failed to carry out his prescribed duties of keeping the warehouse clean and rotating the stock of merchandise; during his absences due to illness, he failed to notify the employer as to the reasons or when he expected to return; and failed to exercise proper care in the [fol. 226] operation of a fork-lift truck, by starting the same while it was in gear and causing it to fall a distance of four feet from the warehouse floor to the railroad siding, thereby endangering his life and causing extensive damage to the truck.

2. That such unsatisfactory work was the reason for Melvin T. Welsch's discharge on May 27, 1958.

The Board now enters the following

CONCLUSION OF LAW

That Melvin T. Welsch is not entitled to be reinstated in his former employment with Lucas Flour Company.

AWARD

The Board hereby orders that the discharge of Melvin T. Welsch on May 27, 1958, was justified and that he is not entitled to reinstatement with his former employer, Lucas Flour Company."

VII.

The Court, notwithstanding said award, and over objections of plaintiff's counsel, allowed the introduction of evidence bearing on the good faith of defendant in picketing plaintiff's place of business. The Court expressly finds, from all of said evidence, the picketing was the result of the decision of aforesaid Floyd Anderson; that the defendant has not disputed nor did it dispute at the trial its

responsibility for the acts and conduct of said Floyd Anderson; that said Floyd Anderson was motivated by something other than the union's mutual aid and protection; [fol. 227] and that the defendant union has failed to produce evidence of sufficient weight to satisfy the burden of proof in support of its affirmative defense that the union acted justifiably under the circumstances.

VIII.

Plaintiff was damaged by the acts of defendant in the sum of $6,338.17 general damages for loss of profits, and for special damages as follows: demurrage, $122.57; truck rentals, $40.86; or a total of $6,501.60.

From the Foregoing Findings of Fact the Court Derives the Following

Conclusions of Law

I.

The defendant's picketing of plaintiff's premises was illegal and coercive.

II.

The decision, findings, and award of the arbitrators on file herein are final and binding on the parties hereto.

III.

Plaintiff is entitled to damages from defendant in the sum of $6,501.60, together with its costs to be taxed herein in accordance with law.

Done in Open Court this 16th day of July, 1959.

Raymond Royal, Judge.

Presented by Allen, DeGarmo & Leedy, By Stuart G. Oles, 1308-18 Northern Life Tower, Seattle, Washington.

Copy Received. Notice of presentation waived.
MacDonald, Hoague & Bayless

[fol. 228] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 521982

LUCAS FLOUR COMPANY, a Washington corporation, Plaintiff,

—vs—

LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, Defendant.

JUDGMENT—July 16, 1959

This Cause came on regularly for trial before the undersigned Judge of the above-entitled Court the 16th day of March, 1959, the Court sitting without a jury, and the trial proceeded that day and on the following day. Plaintiff appeared by and through its attorneys, Allen, DeGarmo & Leedy, and the defendant Local 174, Teamsters, Chauffeurs & Helpers of America (hereafter called Local 174) appeared by and through its attorneys, MacDonald, Hoague & Bayless. Plaintiff at commencement of trial moved to amend its Second Amended Complaint as more fully set forth in its Notice of Trial Amendment herein, and there being no objection said motion was granted. All defendants save Local 174 were, without objection, dismissed from the action without prejudice. The Court heard and [fol. 229] considered the opening statements, testimony, stipulations, evidence, and arguments adduced by counsel; thereafter both parties rested, and the Court took the cause under advisement. Thereafter on April 9, 1959 the Court filed herein its Memorandum Decision. Subsequently the Court heard, considered and denied defendant's Motion for Dismissal as shown by the files herein. Having considered the files and records herein together with matters presented at trial and being fully advised in the prem-

ises, and having heretofore made and entered herein Findings of Fact and Conclusions of Law, now, therefore

It Is Ordered, Adjudged and Decreed that plaintiff Lucas Flour Company, a Washington corporation, be and the same hereby is granted judgment against defendant Local 174, Teamsters, Chauffeurs & Helpers of America, an unincorporated association, in the sum of $6,501.60, together with plaintiff's costs to be taxed herein in accordance with law.

Done in Open Court this 16th day of July, 1959.

Raymond Royal, Judge.

Presented by Allen, DeGarmo & Leedy, By Stuart G. Oles, 1308-18 Northern Life Tower, Seattle, Washington.

Copy received, notice of presentation waived. MacDonald, Hoague & Bayless.

[fol. 230] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 521982

LUCAS FLOUR COMPANY, a Washington corporation, Plaintiff,

—vs—

LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, Defendant.

ORDER DENYING MOTION FOR DISMISSAL NOTWITHSTANDING MEMORANDUM DECISION—July 16, 1959

This Matter came on for hearing on May 29, 1959 before the undersigned Judge of the above-entitled Court upon the Motion of defendant for Dismissal Notwithstanding Memorandum Decision, the parties appearing by and

through their attorneys of record, and the Court having heard argument of counsel, having considered the briefs filed by counsel, having rendered its Memorandum Decision of July 13, 1959, and being fully advised in the premises, now, therefore

It Is Ordered that the Motion of defendant for Dismissal Notwithstanding Memorandum Decision be and the same hereby is denied.

Done in Open Court this 16th day of July, 1959.

Raymond Royal, Judge.

Presented by Allen, DeGarmo & Leedy, By Stuart G. Oles, 1308-18 Northern Life Tower, Seattle, Washington.

Copy received, notice of presentation waived. MacDonald, Hoague & Bayless.

[fol. 231]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 35310

Department One

LUCAS FLOUR COMPANY, Respondent,

v.

LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, Appellant.

OPINION—Filed October 13, 1960

This is an appeal from a judgment for the plaintiff in an action for damages, which arose out of the following facts.

The plaintiff, Lucas Flour Company, is a Washington corporation, principally engaged in the wholesale distribution of flour. The plaintiff employed members of the defendant, Local 174, Teamsters, Chauffeurs & Helpers

of America, with whom the plaintiff had entered into a collective bargaining agreement on April 1, 1955.

In 1953, the plaintiff had employed one Melvin T. Welsch, who first worked as a truck driver and then as a warehouseman. His work was unsatisfactory in both capacities and on more than one occasion only the intervention of the union forestalled his discharge. On May 12, 1958, Welsch started a fork-lift truck, used in the plaintiff's warehouse, while it was in gear and caused it to run off the end of the warehouse floor onto the railroad tracks four feet below. The truck was extensively damaged, and Welsch was injured. While at home recovering from these injuries, Welsch received the following memo from the plaintiff:

> [fol. 232] "... The enclosed check covers your second week of vacation. We have decided that it would be better to take next week off for part of your vacation and than [sic] should we be busy the following week I will call you, otherwise take the second week of your vacation and rest...."

On the same day, May 23, Welsch went to see Floyd Anderson, business agent and vice-president of Local 174, and stated that he was ready to return to work. Welsch obtained a written release from his doctor pursuant to Anderson's advice. He presented the release to the secretary-treasurer of the plaintiff corporation, who told him to take the week off and that they would call him if they were busy the following week. Welsch reported this to Floyd Anderson who called the plaintiff's plant, and on the morning of May 27, 1958 sent a business agent to the plant. The business agent was informed that Welsch had been discharged for unsatisfactory work, and he reported this to Floyd Anderson by telephone. The business agent then called the plaintiff's employees out on strike and the plant was picketed. The picketing continued until June 4, 1958, when it was terminated by a temporary injunction issued by the superior court for King county. On September 11, 1958, the matter of Welsch's discharge was submitted to arbitration, and on November 11, 1958 the arbitrators made the following findings and award:

"1. That the work of Melvin T. Welsch was unsatisfactory prior to his discharge, in that he failed to carry out his prescribed duties of keeping the warehouse clean and rotating the stock of merchandise; during his absences due to illness, he failed to notify the employer as to the reasons or when he expected to return; and failed to exercise proper care in the operation of a fork-lift truck, by starting the same while it was in gear and causing it to fall a distance of four feet from the warehouse floor to the railroad siding, thereby endangering his life and causing extensive damage to the truck.

"2. That such unsatisfactory work was the reason for Melvin T. Welsch's discharge on May 27, 1958.

". . .

"AWARD

"The Board hereby orders that the discharge of Melvin T. Welsch on May 27, 1958, was justified and that he is not entitled to reinstatement with his former employer, Lucas Flour Company."

[fol. 233] The action for damages came on for trial on March 16, 1959, both parties stipulating that the findings of the arbitrators were binding upon them. The trial court took additional evidence on matters which it considered had not been covered by the findings of the arbitrators, and at the conclusion of the trial entered judgment awarding damages, in the amount of $6,501.60, to the plaintiff. The defendant appeals.

The appellant, Local 174, contends the trial court was without jurisdiction because the national labor relations board had exclusive jurisdiction over the controversy:

Appellant cites the recent case of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 3 L. Ed. (2d) 775, 79 S. Ct. 773 (1959), wherein the United States supreme court said:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act

[61 Stat. 140], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. . . .

"At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. . . ."

that case, the cause had proceeded through the courts on the assumption that it was an unfair labor practice. The instant case is not one in which it is clear, nor in which it may be fairly assumed, that the activity is protected by § 7 or prohibited by § 8 of the national labor relations act. On the contrary, a reading of the sections makes it clear that the activities here involved fail to come within the purview of either of these sections. Section 7 of the act, 29 U. S. C. A., § 157, provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

[fol. 234] The collective bargaining agreement in force between these parties contained the following provision:

"The Employer reserves the right to discharge any man in his employ if his work is not satisfactory."

The strike in the instant case was in protest against the discharge of an employee for admittedly unsatisfactory work; in clear violation of the agreement. It was an attempt to force the respondent to forego the exercise of a right expressly provided by the agreement. It could scarcely be argued that the same provision of the act, which gives the right to bargain collectively and to enter into collective bargaining agreements, also gives the right to ignore such

agreements, or gives the right to do anything which would nullify the effect of such agreements.

The question then remains whether this was a strike which would constitute an unfair labor practice under § 8 of the act, 29 U. S. C. A., § 158, which provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: . . . or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees . . .

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been cer-

tified . . . (C) forcing or requiring any employer to [fol. 235] recognize or bargain with a particular labor organization . . . if another labor organization has been certified as the representative . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board . . .

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory . . .

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

From our reading of this section we cannot say that it might be "fairly assumed" that the instant case falls within the purview of any of the subsections of 29 U. S. C. A., § 158(b). Therefore, the test announced in *San Diego Building Trades Council* v. *Garmon, supra,* when applied to the present facts, does not militate against state court jurisdiction.

However, this is not the sole basis for concluding that this is a case properly within the ambit of state jurisdiction. The respondent brought this action in the superior court of this state to recover for damages incurred as a result of appellant's attempt to coerce the respondent into foregoing his exercise of a contractual right. In *Selles* v. *Local 174 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 50 Wn. (2d) 660, 314 P. (2d) 456 (1957), this court said:

"We know that the Federal government has preempted the field as to many phases of labor relations, but not as to all. We cannot find from the act, as interpreted by the supreme court, that it was the inten-

tion of Congress to deprive a workman of his time-honored right to sue in his own state court for damages resulting from a common-law tort and to relegate him, for sole relief, to this particular Federal agency.

"Under the facts of this case, there is no 'resounding collision' between the remedies afforded under the act and in the state court. Under the one, the board shall issue a cease and desist order and *may* order reinstatement, with or without back pay. Under the other, the state court may not enjoin or issue a cease and desist order (except in case of violence), and may not order back pay, but it can award damages for a common-law tort. The relief granted by the board, with the exception of the cease and desist order, is entirely discretionary and is exercised to effectuate the policies of the act and, in particular, to prevent unfair labor practices. The relief granted in a common-law tort action is compensation to a plaintiff for damages sustained by reason of the tort.

[fol. 236] "Where the relief granted under state procedure is so similar to that granted under the act that a conflict ensues between the two, the conflicting state procedure is excluded. Where such relief is not similar to that afforded under the act, there is no conflict between the state and Federal remedies, and the state procedure survives. . . . Respondent's right to damages, in this case, for a common-law tort, differs from any remedy which the board has power to provide. The state court, therefore, had jurisdiction to entertain the action."

We believe the theory of the *Selles* case is applicable whether the damages are the result of tortious interference with a party's employment or business or the result of depriving that party of a contractual right. It would be unreasonable to conclude that Congress intended to pre-empt the field of labor relations to such an extent that any party, employer, employee or labor organization would be left without a means of obtaining compensation for damages suffered.

Appellant contends, however, that § 301 of the labor management relations act, 29 U. S. C. A., § 185, has supplanted common-law interpretation and enforcement of collective bargaining agreements.

Section 301 of the labor management relations act confers jurisdiction upon the lower federal courts to entertain suits based upon violations of labor agreements. We find nothing in the plain language of this statute which can reasonably be interpreted as pre-empting state jurisdiction, or as affecting it by limiting the substantive law to be applied.

The appellant next contends that the picketing involved in the instant case was not in violation of the collective bargaining agreement, unless the agreement expressly or impliedly contained a no-strike provision. We disagree. The collective bargaining agreement existing between the parties to this lawsuit created rights and duties on both sides. One of the principal benefits obtained by entering into a collective bargaining agreement is that each party's rights are clearly defined and established, and in the fact that each may freely and safely exercise these rights. By virtue of the agreement here in question the respondent had [fol. 237] the right to discharge any employee for unsatisfactory service. If the appellant could bring coercive economic pressure to bear whenever the respondent should attempt a proper exercise of this right, the collective bargaining agreement would have been merely a worthless gesture, a document to be treated by both parties as though it had never been executed.

The collective bargaining agreement is the cornerstone of successful labor management relations. To hold that either party to such an agreement can disregard its express terms without incurring liability for the consequences would annihilate all progress in this area with a single stroke of the pen. Collective bargaining agreements would be unenforcible by either side, and would create rights without remedies to protect these rights.

The appellant next contends that this court is not justified in sustaining jurisdiction on the basis that the picketing was in breach of contract since the trial court based its judgment solely on tort liability and made no finding of a breach of contract.

From the pleadings, the theory is established that the respondent was injured by the appellant's breach of contract and this theory is clearly supported by the record. Therefore, the rule that the judgment of the trial court will be sustained on any theory established by the pleadings and supported by the proof is applicable. *Lundberg* v. *The Corporation of Catholic Archbishop of Seattle*, 155 Wash. Dec. 75, 346 P. (2d) 164 (1959); *Guerin* v. *Thompson*, 53 Wn. (2d) 515, 335 P. (2d) 36 (1959).

Finally, the appellant contends the evidence of lost profits was too speculative and uncertain to show the respondent's damages with reasonable certainty.

We are satisfied that there is substantial evidence in the record to support the finding of the fact of damage to the [fol. 238] respondent's business with reasonable certainty, and the amount of damages awarded was well within the range of the evidence introduced.

Finding no merit in appellant's other assignments of error, the judgment of the trial court must therefore be affirmed.

It is so ordered.

Hunter, J.

We Concur: Weaver, C.J.; Mallery, J.; Hill, J; Foster, J.

[fol. 239]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 35310

King County No. 521982

LUCAS FLOUR COMPANY, Respondent,

vs.

LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, Appellant.

JUDGMENT—November 15, 1960

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of

King County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 15th day of November, A. D. 1960, on motion of Allen, DeGarmo and Leedy, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said Lucas Flour Company have and recover of and from the said Local 174, Teamsters, Chauffeurs & Helpers of America, an unincorporated association, and from Continental Casualty Company, surety to the extent of $300.00, the costs of this action taxed and allowed at Three hundred thirty-six and 92/100 ($336.92) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 240] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 241]

PLAINTIFF'S EXHIBIT 1

PRIVATE CARRIER AGREEMENT

TERMS OF AGREEMENT

The following agreement and scale of wages shall be in force and effect on and after April 1, 1955, as between LUCAS FLOUR and Local Union #174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and shall continue in effect until April 1, 1958, and shall continue from year to year thereafter provided either party may open this agreement by giving notice in writing not later than sixty days prior to the expiration date.

GENERAL CONDITIONS

ARTICLE I

The Employer agrees to continue to recognize the Union as the sole collective bargaining agent for all employees falling within the jurisdiction of this agreement.

It is further agreed that all Union workmen employed by the Employer shall maintain their membership in good standing in the Union and that non-union workmen employed shall become members of the Union on or after the thirtieth day following the beginning of employment or the effective date of this agreement, whichever is later. Further, any liberalization from the Union's point of view which may be made in the Union Shop Provision as defined in the Labor Management Relations Act, either by Congressional Amendment or Judicial decision, shall be adopted by the parties and made a part of this agreement.

ARTICLE II

The Employer reserves the right to discharge any man in his employ if his work is not satisfactory.

ARTICLE III

No workman shall be discriminated against for upholding Union principles, and any man who works under the instructions of the Union, or who serves on a committee shall not lose his job or be discriminated against for this reason.

It shall not be a violation of this agreement or cause for discharge for any employee to refuse to cross a picket line in the performance of his duties.

ARTICLE IV

The following days shall be considered holidays: January 1, February 22, May 30, July 4, Labor Day, Thanksgiving Day, and December 25, and all regular employees shall be paid for all such holidays regardless upon which day in the week the holiday should fall. If any work is performed by such employee on such holiday, additional compensation at straight time shall be paid. No employee shall be called on such holiday for less than a full day. When any of the aforementioned holidays fall on Sunday, the Monday following shall be considered the holiday. If a holiday occurs during an employee's vacation, he shall receive holiday pay in addition to his vacation pay.

Five consecutive days of eight consecutive hours, Monday through Friday, inclusive, shall constitute a week's work; time to start when driver arrives at the garage. No driver and/or helper shall work before 7:00 A.M. or after [fol. 242] 6:00 P.M. except in cases of emergency and/or by mutual consent between the Employer and Local Union #174. Any work performed before the regular starting time, or after the regular quitting time, shall be considered overtime and shall be paid for at the rate of time and one-half. All Saturday work shall be guaranteed eight (8) hours work at the rate of time and one-half. All Sunday work shall be guaranteed eight (8) hours work at the rate of double time.

Any extra helper or driver working four (4) full consecutive days in five (5) consecutive days (Sundays and

holidays excepted) shall be considered a steady man, and shall be paid the same scale of wages as a steady man.

Article V

All members who have been employed for a period of one (1) year or over shall have one (1) weeks' vacation with pay; for two (2) years or over, two (2) weeks' vacation with pay; and fifteen (15) years of employment, three (3) weeks' vacation with pay.

All regular employees shall receive pro-rated vacations after the first year of service at the rate of 1/12 of the determined vacation pay for each month of service.

Any employees who have been receiving more favorable vacation privileges prior to the signing of this agreement shall continue to receive them for the duration of this agreement.

Article VI

Seniority shall prevail in layoffs for all employees after three (3) months' service. In the event of a layoff, the last employee hired, shall be the first laid off.

Article VII

When a regular driver takes out a vehicle, he shall receive a full day's pay. Any regular driver reporting for duty in the morning, waiting subject to orders, shall be paid for one-half day. In computing overtime, for less than fifteen minutes, fifteen minutes shall be allowed; for over fifteen minutes and less than one-half hour, one-half hour shall be allowed; for over one-half hour and less than forty-five minutes, forty-five minutes shall be allowed; for over forty-five minutes and less than one hour, one hour shall be allowed.

Article VIII

When Employers prescribe wearing apparel for employees, they shall pay for same. It shall bear the Union label.

Employees who wear uniforms prescribed by Employers shall pay for the cleaning of same not to exceed ten cents (10¢) per day.

ARTICLE IX

No employee, who prior to the date of this agreement, was receiving more than the rate of wages designated in this agreement for the class of work in which he is engaged, shall suffer a reduction in the rate of wages from the application of this agreement.

[fol. 243]

ARTICLE X

EFFECTIVE APRIL 1, 1955

All regular employees shall be guaranteed a full week's work.

	Per Week	*Per Hour Overtime*
Trucks with Gross License Capacity 20,000 lbs. and under	$86.60	$3.24¾
Over 20,000 lbs.	88.60	3.32¼
Semi Trucks and Trucks and Trailers	90.60	3.39¾
Steady Helpers and Bull Drivers	83.60	3.13½
Extra Helpers and Drivers of Trucks 20,000 lbs. and under	2.16½	3.24¾
Extra Drivers of Trucks over 20,000 lbs.	2.26½	3.39¾

EFFECTIVE APRIL 1, 1956

All regular employees shall be guaranteed a full week's work.

	Per Week	*Per Hour Overtime*
Trucks with Gross License Capacity 20,000 lbs. and under	$89.00	$3.33¾
Over 20,000 lbs.	91.00	3.41¾
Semi Trucks and Trucks and Trailers	93.00	3.48¾
Steady Helpers and Bull Drivers	86.00	3.22½
Extra Helpers and Drivers of Trucks 20,000 lbs. and under	2.22½	3.33¾
Extra Drivers of Trucks over 20,000 lbs.	2.32½	3.48¾

EFFECTIVE APRIL 1, 1957

All regular employees shall be guaranteed a full week's work.

	Per Week	*Per Hour Overtime*
Trucks with Gross License Capacity 20,000 lbs. and under	$91.80	$3.44¼
Over 20,000 lbs.	93.80	3.51¾
Semi Trucks and Trucks and Trailers	95.80	3.59¼
Steady Helpers and Bull Drivers	88.80	3.33
Extra Helpers and Drivers of Trucks 20,000 lbs. and under	2.29½	3.44¼
Extra Drivers of Trucks over 20,000 lbs.	2.39½	3.59¼

[fol. 244]

ARTICLE XI

Night shift premium of fifteen cents (15¢) per hour shall be paid for all second shift work performed between the hours of 6:00 P.M. and 7:00 A.M.

As of April 1, 1955, each company shall pay into a Health and Welfare Fund the sum of $10.40 per month for every employee covered by this agreement who worked eighty (80) hours or more in the month of March 1955, and thereafter shall pay $10.40 per month for each eligible employee, employed eighty (80) hours or more during the preceding month, said payment to be made on or before the tenth (10th) day of each month.

ARTICLE XII

Commencing October 1, 1955, and during continuance of this Collective Bargaining Agreement, the Employer shall pay into the Western Conference of Teamsters Pension Trust Fund on account of each member of the bargaining unit an amount equal to ten cents (10¢) for each hour for which compensation is paid to him, said amounts to be computed monthly. The total amount due for each calendar month shall be remitted in a lump sum not later than ten days after the last business day of each month. The Employer agrees to abide by such rules as may be established by the Trustees of said Trust Fund to facilitate the determination of the hours for which contributions are due, the prompt and orderly collection of such amounts, and the accurate reporting and recording of such hours and such amounts paid on account of each member of the bargaining unit. Failure to make all payments herein provided for, within the time specified, shall be a breach of this agreement.

ARTICLE XIII

In the event of war, declaration of emergency, imposition of civilian wage controls by the U. S. Government during the life of this contract, either party may reopen the same upon thirty (30) days written notice and request renegotiation of matters dealing with wages and hours. Upon the failure of the parties to agree in such negotiations, either party shall be permitted all *lawful* economic recourse to support their request for revisions. If governmental approval of revisions should become necessary, all parties will cooperate to the utmost to attain such approval. The parties agree that the notice provided herein

shall be accepted by all parties as compliance with the notice requirements of applicable law so as to permit economic action at the expiration thereof.

ARTICLE XIV

Should any difference as to the true interpretation of this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said members cannot agree, a third member, who must be a disinterested party shall be selected, and the decision of the said Board of Arbitration shall be binding. It is further agreed by both parties hereto that during such arbitration, there shall be no suspension of work.

Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding.

If any employee is removed from service for any doubtful cause, he shall have a fair and impartial investigation within three days. If found guilty, he shall suffer the penalty, and if not, he shall be paid for his time off at the regular scale of wages.

SIGNED THIS ..... DAY OF 1955

FOR THE COMPANY:

.....

FOR THE: INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION 174

/s/ GEO. CAVANO
George Cavano, Secretary-Treasurer

[fol. 245]

[Filed in County Clerk's Office—King County, Washington—June 3-1958—Norman R. Riddell, Clerk—by W. E. Field, Deputy.]

[Ent'd.]

[fol. 246] [Enf'd.]

PLAINTIFF'S EXHIBIT 11

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

No. 521982

LUCAS FLOUR COMPANY, a Washington corporation, Plaintiff,

vs.

NUGENT LAPOMA; JOHN DOE I; JOHN DOE II; JOHN DOE III; LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, Defendants.

RECORD OF ARBITRATION

[Filed in County Clerk's Office—King County, Washington—Mar 16 1959—Norman R. Riddell, Clerk—by Lloyd D. Thompson, Deputy.]

BE IT REMEMBERED that pursuant to order of the court entered herein June 4, 1958, the undersigned Walter Briem and Hugh E. Pickel were duly nominated to act as arbitrators, and proceeded to arbitrate as required by order of this Court and by the contract between the parties, in a meeting on the morning of June 16, 1958, and thereafter met again to further discuss this arbitration, and have had several telephone conferences in connection therewith, but finally conclude they are deadlocked. Accordingly, the undersigned arbitrators, pursuant to Article XIV of the labor agreement in effect between plaintiff and defendant Union, have unanimously and mutually selected a third arbitrator, to wit, Harry Margolis, 406 Vance Building, Seattle, to sit with them as a board of three arbitrators, to decide the following questions:

1. Whether the work of Mr. Melvin T. Welsch was satisfactory or unsatisfactory prior to his discharge.

[fol. 247] 2. The reason or reasons for the discharge of Melvin T. Welsch by the plaintiff.

3. Whether Melvin T. Welsch is entitled to be reinstated in his employment by the plaintiff, and if so, the terms of reinstatement.

It is further stipulated and agreed that the decision of the three arbitrators when reached shall be final and binding upon all parties hereto, and that appropriate proceedings will be had to conduct the arbitration contemplated; Provided, That: in the event the arbitrators are at variance in deciding any issue, the unanimous decision of any two of said arbitrators on said issue shall be final and binding on the parties as to that issue.

Dated this 11th day of September 1958 at Seattle, Washington

/s/ Walter Briem

/s/ Hugh E. Pickel

/s/ Harry Margolis

Approved:

/s/ Kenneth A. MacDonald
Attorney for defs

/s/ Stuart G. Oles of
attorneys for Lucas Flour Company

[fol. 248] [Ent'd.]

PLAINTIFF'S EXHIBIT 12

BEFORE A BOARD OF ARBITRATORS

In re

MELVIN T. WELSCH

[Filed in County Clerk's Office—King County, Washington—Mar 16 1959—Norman R. Riddell, Clerk—by Lloyd D. Thompson, Deputy.]

BOARD MEMBERS:

Hugh E. Pickel
Walter Briem
Harry Margolis

APPEARANCES:

Melvin T. Welsch and Teamsters Union Local No. 174, by MacDonald, Hoague & Bayless (Kenneth A. MacDonald)

Lucas Flour Company, by Allen, DeGarmo & Leedy (Stuart G. Oles)

OPINION

The questions presented to this Board are:

1. Whether the work of Mr. Melvin T. Welsch was satisfactory or unsatisfactory prior to his discharge.
2. The reason or reasons for the discharge of Melvin T. Welsch by the employer, Lucas Flour Company.
3. Whether Melvin T. Welsch is entitled to be reinstated in his employment and, if so, the terms of reinstatement.

Lucas Flour Company, a Washington corporation, is engaged in business in Seattle as an independent distributor

of flour. It is a small, family operation which employs two and at times three persons, in addition to the corporate officers and the office staff. These persons consist of one truck driver and one or two warehousemen. The driver and warehousemen are and have been members of Teamsters Union Local No. 174, with which union Lucas Flour Company has a working agreement. Melvin T. Welsch was employed by this firm for a period of about five years up to May 27, 1958, when he was discharged. During the first two or three years of his employment he worked as a truck [fol. 249] driver, and the remainder of his employment was served out as a warehouseman.

The working agreement between the employer and the union contains the following provisions:

ARTICLE II

The Employer reserves the right to discharge any man in his employ if his work is not satisfactory.

ARTICLE III

No workman shall be discriminated against for upholding Union principles, and any man who works under the instructions of the Union, or who serves on a committee shall not lose his job or be discriminated against for this reason.

It shall not be a violation of this agreement or cause for discharge for any employee to refuse to cross a picket line in the performance of his duties.

ARTICLE VI

Seniority shall prevail in layoffs for all employees after three (3) months' service. In the event of a layoff, the last employee hired, shall be the first laid off.

ARTICLE XIV

Should any difference as to the true interpretation of this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said mem-

bers cannot agree, a third member, who must be a disinterested party shall be selected, and the decision of the said Board of Arbitration shall be binding. It is further agreed by both parties hereto that during such arbitration there shall be no suspension of work.

Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding.

If any employee is removed from service for any doubtful cause, he shall have a fair and impartial investigation within three days. If found guilty, he shall suffer the penalty, and if not, he shall be paid for his time off at the regular scale of wages.

[fol. 250] Pursuant to Article XIV, Hugh E. Pickel, representing the employer, and Walter Briem, representing the union, met as a Board of Arbitrators in an effort to determine the status of Mr. Welsch's discharge. The two arbitrators became deadlocked, and they then mutually selected Harry Margolis as the third arbitrator. Under the terms of the Record of Arbitration (Ex. 2), signed by the three arbitrators and approved by counsel for the parties, the decision of any two or more arbitrators on each issue presented is to be final and binding on such issue.

Much of the testimony has to do with the employer's dissatisfaction with Mr. Welsch's services during the period he worked as a truck driver. The reasons underlying such dissatisfaction are of no great importance now, since they antedated the discharge by two years or more. It is undisputed, however, that on at least one occasion the employer's dissatisfaction rose to such a point that it had actually fired Mr. Welsch, but reinstated him after a union representative informed the employer, "we were going to have to tie them up" (R. 168). That incident was during the time Mr. Welsch was still working as a truck driver and occurred more than two years ago. Other testimony on behalf of the employer is to the effect that there were several occasions between that time and May, 1958, when it sought to discharge Welsch, but that it was dissuaded from doing so because

of the threat of economic sanctions by the union. While that testimony is in the main disputed by the union, the Board finds that the employer felt, and with some justification, that if it had brought about Welsch's discharge, such action would not be without incident. The Board does not imply that there was anything illegal or improper about the union's actions; for all that appears in this record, the union was simply going all-out to protect the employment status of one of its members. The legality or propriety of the union's actions is a matter with which this Board is [fol. 251] not concerned. The fact that the employer was in fear of possible reprisals during at least the last two years of Welsch's employment is, however, of real significance, regardless of the basis for that fear and whether it was justified.

It will be recalled that under the working agreement the employer reserved the right "to discharge any man in his employ if his work is not satisfactory." The Board feels that a proper interpretation of that clause is that the right of discharge is preserved in a case where the man's services are not satisfactory to his employer, but that the right must be invoked reasonably and in good faith. During oral argument, counsel for the parties virtually agreed that such should be the interpretation, although disagreeing as to its application under the facts in the record.

During the latter period of his employment, as a warehouseman, Mr. Welsch's duties included among other things keeping the warehouse clean and rotating the stock so that there would be no accumulation of stale merchandise. The weight of the evidence establishes quite clearly that he was deficient in these duties, in that he failed to keep the warehouse clean and did not keep the stock properly rotated. The employer attempted to correct him in these respects, but to no avail. Welsch also was absent from work due to illness on a number of occasions, and failed to notify the employer as to the reasons or when he would return. This caused the employer considerable inconvenience, since it was difficult to determine whether a replacement should be hired and for how long.

Prior to about May 1, 1958, the employer did not use fork-lift trucks. Around that date the employer moved into

a new warehouse and decided to use that type of mechanized equipment. Before the move, an officer of the employer telephoned a representative of the union and expressed [fol. 252] some doubt as to whether Welsch would be able to handle a fork-lift truck. This doubt was based in part on the fact that Welsch is 68 years of age and had never handled such equipment. The union representative assured the employer that Welsch would work out all right, and the employer accepted that assurance, although somewhat reluctantly. The move to the new warehouse was made and several makes of fork-lift trucks were delivered to the employer for its use on approval.

On May 12, 1958, around 8 o'clock in the morning, Welsch boarded one of the fork-lift trucks for the purpose of moving it away from the doorway of the new warehouse so that a truck could be backed up to the doorway and loaded. The fork-lift truck had been parked facing the doorway. Outside the doorway there was a four-foot drop to the railroad siding. Welsch's intention was to back the fork-lift truck away and park it in another part of the warehouse. Instead, he started the electric motor of the fork-lift truck while it was in forward gear, and the vehicle moved out of the doorway and fell to the siding four feet below, with Welsch still aboard. As a result of this accident, Welsch sustained some injuries necessitating medical treatment, and the truck was rather extensively damaged.

Welsch immediately took off work to obtain medical care and recover from his injuries. The employer did not fire him on the spot, partly because he was not there and partly because of the employer's indecision as to the course of action which should be taken.

Welsch was entitled to two weeks' vacation with pay, but he had been accustomed to working the full 52 weeks of the year (except for time off because of illness) and drawing double pay for two weeks. One week of vacation pay had been given him in April, 1958. He received no pay for the week ending Friday, May 16, 1958, because he was off work due to his injuries. On Friday, May 23, 1958, the employer delivered to him, while he was still off work, a check for the second week of vacation, together with a note suggest- [fol. 253] ing that he take the following week off. This

would have been without pay, since by then he had received his two weeks of vacation pay. By this time, the employer had definitely decided to fire Welsch, but had not quite determined how to go about it. On May 26, Welsch returned to the warehouse for the first time since his injury two weeks before. He wanted to go to work and had a doctor's certificate stating that he was then able to return to his job, but the employer still temporized and insisted on the one-week layoff without pay. Welsch was unhappy with the layoff, and accordingly reported back to the union. That same day, Monday, May 26, representatives of the union and the employer conferred by telephone. There is quite a dispute in the record as to who said what, but on the following morning the union business agent called upon the employer.

That morning, Tuesday, May 27, the business agent was informed by the employer's representative that Welsch was fired as of then, giving "unsatisfactory work" as the reason. As far as the record shows, this was the first indication by the employer to anyone, following the accident of May 12, that Welsch was discharged.

Immediately following the discharge, the union stationed pickets at the employer's place of business. That same day, May 27, the employer commenced an action in the Superior Court for King County (Cause No. 521982), naming the union and its officers as defendants, and seeking both to enjoin the picketing and to recover damages for the allegedly unlawful interference with its business. A temporary injunction enjoining the picketing was issued June 4, 1958, and the action is now awaiting trial.

Welsch has not returned to work for Lucas Flour Company or any other employer.

The Western Conference of Teamsters, with which organization Local 174 is affiliated, provides a pension plan for [fol. 254] eligible union men who have reached a retirement age and who no longer desire to engage in regular gainful employment. On or about September 1, a little more than three months after his discharge, Welsch applied for his pension and he has since been receiving it. This would indicate that at least since the granting of the pension Welsch had no intention of returning to work. These facts

were not made known to counsel or the arbitrators at the time of the hearing herein, but were ascertained later and stipulated by the arbitrators representing both parties. Assuming these facts to be true, then it would appear that Welsch's status after September 1, 1958, is moot.

The majority of the Board is firmly of the view that Welsch's work was unsatisfactory to the employer, that there was a reasonable basis for this dissatisfaction, and that the employer acted in good faith in discharging him. Throughout these proceedings, two questions kept recurring: First, how did the employer manage to get along with Welsch for five years if his work was unsatisfactory? Second, why did the employer fail to discharge Welsch on May 12, 1958, when the accident occurred, or on May 26, 1958, when Welsch reported back for work, but rather wait until the union business agent came out on May 27, 1958? The majority of the Board feels that there is one answer to these questions, namely, that the employer was indecisive and unwilling or unable to meet the continuing problem squarely, and postponed taking final action until the matter was brought to a head and a showdown forced on May 27, 1958. The Board does not overlook the possibility that this controversy would not have assumed its present proportions if the employer had taken a firm stand immediately after the accident and fired Welsch forthwith. It was difficult for the union, in rallying to the assistance of one of its members, to comprehend why the employer would want to postpone the day of reckoning by giving Welsch an addition one-week "layoff," if his work was unsatisfactory to the point of necessitating his permanent separation from [fol. 255] employment. Yet, the facts establish that Welsch was an unsatisfactory employee and that that was the only reason for his termination. Those facts are not in the least changed by the employer's failure to act earlier or by the union's being misled because of the delay. There is nothing in the record to suggest that the employer was anti-union, that Welsch was being discriminated against, or that the employer had ulterior designs in bringing about the final termination. The discharge, while inexpertly handled, was justified, and it follows that Welsch is not entitled to reinstatement.

The Board now makes the following

Findings of Fact

1. That the work of Melvin T. Welsch was unsatisfactory prior to his discharge, in that he failed to carry out his prescribed duties of keeping the warehouse clean and rotating the stock of merchandise; during his absences due to illness, he failed to notify the employer as to the reasons or when he expected to return; and failed to exercise proper care in the operation of a fork-lift truck, by starting the same while it was in gear and causing it to fall a distance of four feet from the warehouse floor to the railroad siding, thereby endangering his life and causing extensive damage to the truck.

2. That such unsatisfactory work was the reason for Melvin T. Welsch's discharge on May 27, 1958.

The Board now enters the following

Conclusion of Law

That Melvin T. Welsch is not entitled to be reinstated in his former employment with Lucas Flour Company.

Award

The Board hereby orders that the discharge of Melvin T. Welsch on May 27, 1958, was justified and that he is not entitled to reinstatement with his former employer, Lucas Flour Company.

[fol. 256] Dated at Seattle, Washington, this 7 day of November, 1958.

/s/ Hugh E. Pickel
Hugh E. Pickel, Member

/s/ Harry Margolis
Harry Margolis, Member

I dissent.

.....
Walter Briem, Member

[fol. 257]

DEFENDANT'S EXHIBIT 13

Memo from
NICK LUCAS

5-23-58

Jack: The enclosed check covers your second week of vacation. We have decided that it would be better to take next week off for part of your vacation and than should we be busy the following week I will call you, otherwize take the second week of your vacation and rest.

(Signed) Pete

[Ent'd.]

[Filed in County Clerk's Office—King County, Washington—Mar 17 1959—Norman R. Riddell, Clerk—Dorothy M. Swain, Deputy.]

[fol. 258]

SUPREME COURT OF THE UNITED STATES

No. 716—October Term, 1960

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, Petitioner,

vs.

LUCAS FLOUR COMPANY

ORDER ALLOWING CERTIORARI—April 3, 1961

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted, and the case is set for argument immediately following No. 641.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 11 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 50

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
an unincorporated Association,
Petitioner,

v.

LUCAS FLOUR COMPANY, a Washington corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

Of Counsel
MacDonald, Hoague & Bayless
320 Alaska Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Counsel for Petitioner

METROPOLITAN PRESS AND WESTERN

SUBJECT INDEX

	Page
Citations to Opinions Below	1
Grounds Upon Which Jurisdiction Is Invoked	2
Questions Presented	2
A. Federal pre-emption as against tort action	3
B. Violation of Contract	3
Statutory Provisions Involved	4
Statement of the Case	4
A. Facts	4
B. How Federal questions were presented	8
Reasons for Granting Petition	9
I. Pre-Emption	9
A. The conclusions reached by the Washington Supreme Court regarding pre-emption are directly contrary to the decision of this Court in *San Diego Building Trades Council v. Garmon*	9
B. By characterizing the protected or prohibited activity as a violation of a contractual right, as in this case, state courts can circumvent the exclusive initial jurisdiction of the National Labor Relations Board in most situations where a collective bargaining contract is in force	12
II. Violation of Contract	13
A. The opinion below is in direct conflict with the decision of this Court in *Textile Workers Union v. Lincoln Mills*	13

Page

B. The judgment below enforces local contract law that is incompatible with §301 of the Taft-Hartley Act and that has therefore been pre-empted by that act 14

C. The decision below, in direct conflict with principles followed in decisions of at least three Circuit Courts of Appeal regarding the §301 no-strike issue, holds that it is a contract violation for a union to strike, even though the union never agreed either expressly or by implication not to strike..... 16

III. This Strike Was Not a Violation of This Collective Bargaining Agreement Within the Meaning of §301 17

A. No intent to prohibit strike against a discharge of a union member appears in this contract 17

B. The purposes of the Taft-Hartley Act dictate that strike prohibitions, unless intended, should not be imported to a contract merely because momentarily convenient 18

IV. Widespread Importance to Industries and Unions of the Issues Determined in Decision Below 19

A. If the decision below as to pre-emption is allowed to stand, it will bring about lack of uniformity to most interstate labor cases..... 19

B. For certainty in existing labor agreements, and in those to be negotiated, it is essential that the contract and pre-emption questions here in issue be resolved..... 21

Page

C. The protection afforded employees by §7 of the Taft-Hartley Act will be substantially reduced, should the decision below stand..... 22

Conclusion 22

Appendices:

Appendix A. Opinion of the Washington Supreme Court .....App. p. 1

Appendix B. Judgment of the Washington Supreme Court .....App. p. 12

Appendix C. Pertinent Sections of the Taft-Hartley Act .....App. p. 13

Appendix D. Private Carrier Agreement.....App. p. 16

TABLE OF CASES

Garner v. Teamsters C. & H. Union, 346 U. S. 485, 98 L.ed. 228, 74 S. Ct. 161 (1953)....14-15

International Association of Machinists v. Gonzales, 356 U. S. 617, 2 L.ed.(2d) 1018, 17 S.Ct. 923 (1958) 12

International Union, U. M. W. of A. v. N. L. R. B., 257 F.(2d) 211 (App. D. C. 1958)..... 11

Lewis v. Benedict Coal Corp., 259 F.(2d) 346 (CCA 6, 1958), aff'd 361 U. S. 459, 4 L.ed.(2d) 442, 80 S. Ct. 489 (1960) 16

Page

Local 774, I. A. M. v. Cessna Aircraft Co., 185 Kans. 183, 341 P.(2d) 989 (1959) 13

Local 9735, U. M. W. v. N. L. R. B., 258 F.(2d) 146 (App. D. C. 1958) 11

San Diego Building Trades Council v. Garmon, 359 U. S. 236, 3 L.ed.(2d) 775, 79 S. Ct. 773 (1959)....7-11

Selles v. Local 174, I. B. T., 50 Wn.(2d) 660, 314 P. (2d) 456 (1957) cert. den. 356 U. S. 975, 2 L.ed. (2d) 1149, 78 S. Ct. 1134 (1958) 12

Textile Workers Union v. Lincoln Mills, 353 U. S. 448, 1 L.ed.(2d) 972, 77 S. Ct. 912 (1957).....13, 14

U. A. W. v. Russell, 356 U. S. 634, 2 L.ed.(2d) 1030, 78 S. Ct. 932 (1958) 12

United Construction Workers v. Haislip Baking Co., 223 F.(2d) 872 (CCA 4, 1955) cert. den. 350 U. S. 347 16

U. M. W. A. v. N. L. R. B., 257 F.(2d) 211, (App. D. C. 1958) 16, 17

United Mine Workers of America and Boone County Coal Corp., 117 N. L. R. B. 1095 (1957)..... 11

United Mine Workers Union and Westmoreland Coal Company, 117 N. L. R. B. 1072 (1957) 11

United States Steel Corp. v. Nichols, 229 F.(2d) 396, 399, 56 ALR(2d) 980, (CCA 6, 1956); cert. den. 351 U. S. 950, 100 L.ed. 1474, 76 S. Ct. 846..... 19

Weber v. Anheuser-Busch, 348 U. S. 468, 99 L.ed. 546, 75 S Ct. 480 (1955) 16

Page

TABLE OF STATUTES

28 U.S.C. Sec. 1257 (3), 62 Stat. 929..... 2

29 U.S.C. Sec. 157, 158, 185, 61 Stat. 140, 143, 156, 157; §§7, 8 and 301 of Taft-Hartley Act..... 2

TEXTBOOKS AND REPORTS

9 Labor Law Journal 406 (1958)..... 11

Labor Relations Reference Manual, Vol. 32, p. 6..... 18

Labor Relations Reporter LRX 87, Section 14..... 18

57 Mich. L. R. 807, 825; Feinsinger, The National Labor Relations Act and Collective Bargaining..... 11

Sen. Minority Report 105, Part 2, 80th Cong., 1st Sess. (1947) p. 22 17

Sen. Rep. 105, Part 1, 80th Cong., 1st Sess. (1947) pp. 17-18 17

IN THE

Supreme Court of the United States

October Term, 1960

No.....

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated Association,

Petitioner,

v.

LUCAS FLOUR COMPANY, a Washington corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America, prays that a Writ of Certiorari issue to review the judgment of the Washington Supreme Court entered in the above-entitled case on November 15, 1960.

CITATIONS TO OPINIONS BELOW

The memorandum opinions of the Superior Court of the State of Washington for King County are unreported and are set forth in the certified record (T. 39-55, 98-101)[1]. The opinion of the Washington Supreme Court is reported

[1]The page references to the certified transcript of record will be referred to as T. The page references to the verbatim transcript of the testimony at the trial (called Statement of Facts by Washington rule) will be referred to as St.

in 156 Wash. Dec. 935, 356 P.(2d) 1, and is in the certified record (T. 126-133), and in Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of Washington was entered on November 15, 1960 (T. 134, Appendix B). The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257 (3), since the rights, privileges and immunities specially set up and claimed under 29 U.S.C. Sec. 157, 158 and 185 have been denied.

QUESTIONS PRESENTED

Respondent conducts a flour brokerage business admittedly affecting interstate commerce. Petitioner union struck and maintained a one-man picket at respondent's warehouse for eight days in protest against the discharge of a union member employed by respondent. Some months thereafter it was determined retroactively by arbitration that the employee's work had been unsatisfactory and that such unsatisfactory work had been the reason for his discharge. The collective bargaining agreement between petitioner and respondent did not contain a no-strike clause applicable to this situation but did provide:

> "The Employer reserves the right to discharge any man in his employ if his work is not satisfactory."[2]

Neither party at any time applied to the National Labor Relations Board for relief in connection with this strike. The questions presented are:

[2]The contract is set out in full in Appendix D hereto.

A. Federal pre-emption as against tort action.

(1) Did the Washington Supreme Court's determination that this strike was neither protected by §7 nor prohibited by §8 of the Taft-Hartley Act[3] justify its assumption of jurisdiction of this action in the absence of any such determination by the National Labor Relations Board?

(2) Except for a suit under §301 of the Act, does not the National Labor Relations Board have exclusive primary jurisdiction to determine whether this labor agreement removed this strike from the protection of §7 or the prohibitions of §8 of the Taft-Hartley Act?

(3) Was not this strike, in protest against the employer's firing of a union member, an activity which is arguably protected by §7 or prohibited by §8 of the Taft-Hartley Act?

(4) May the State Court award damages in tort for injury caused by this strike in the absence of an initial determination by the National Labor Relations Board that the strike is neither a protected nor a prohibited activity under the Taft-Hartley Act?

B. Violation of Contract.

(5) In the absence of an express or implied no-strike agreement, can this strike constitute a violation of a collective bargaining agreement under §301 of the Taft-Hartley Act?

(6) If the strike was not a violation of contract under

[3] 61 Stat 136-158, 29 U.S.C. Secs. 141-187.

§301, did the State Court have jurisdiction to award damages for breach of contract under incompatible State doctrines of contract law?

(7) In the absence of an express or implied no-strike agreement, is not a strike in protest against the employer's discharge of a union member an activity protected by §7 of the Taft-Hartley Act?

(8) Has §301 of the Taft-Hartley Act supplanted incompatible substantive law of the State of Washington as to what conduct constitutes a breach of a collective bargaining agreement in an industry affecting interstate commerce?

(9) Was it a violation of this contract (within the meaning of §301) to strike for the purpose of forcing the reinstatement of a union member who had been discharged for unsatisfactory work, where at the time of the strike the union, on reasonable grounds, contended that the discharge was not because of unsatisfactory work?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are those included in the Labor-Management Relations Act of 1947, as amended, (61 Stat 136-158, 29 U.S.C. Secs. 141-187) herein and commonly called the "Taft-Hartley Act." Pertinent sections of the Act are reproduced in Appendix C hereto.

STATEMENT OF THE CASE

A. Facts.

The respondent is a corporation engaged in the whole-

sale distribution of flour with its principal place of business and warehouse located at Seattle, Washington. Respondent purchases annually approximately $400,000.00 worth of flour and similar products from outside the State of Washington, representing approximately 60 per cent of respondent's total annual purchases (St. 14-18). At all pertinent times the respondent employed their truckers and warehousemen only from the membership of the petitioner, Local 174 (St. 184). Respondent had a collective bargaining agreement effective from and after April 1, 1955 containing among other things the following provision: (Exhibit 1, Appendix C, p. 17).

"ARTICLE II

> The employer reserves the right to discharge any man in his employ if his work is not satisfactory."

On May 12, 1958, "Jack" Welsch, a member of Local 174 and an employee of respondent for over five years (St. 158), had an accident as a result of which he stayed at home under doctor's care for two weeks (St. 161). When he was ready to return to work, respondent told him to take that week off and if they were busy the next week they would call him (St. 163, Exhibit 13). That same day the union business agent unsuccessfully protested this lay-off over the phone to the respondent (St. 135-137, 183). The next morning, May 27, 1958, petitioner sent a business agent with Welsch to the respondent's plant to "see what the problem was" (St. 138-139, 164, 174). Respondent's representative opened the meeting by stating that Welsch was discharged for unsatisfactory

work (St. 174, 165). This was the first indication by the respondent to either Welsch or a union representative that respondent was contemplating discharging Welsch (T. 46-47, St. 137, 164). Within a short time thereafter, a one-man picket (St. 142, R.42) was established at respondent's plant and the employees went out on strike (St. 139-140, 56). The strike continued for eight days after which it was terminated pursuant to a temporary injunction issued in this action (T. 6).

As to the cause of the strike, the trial court stated (T. 47, and see Exhibit 12, p. 7):

> "The employer was undecisive in its attitude toward Welsch and did not take a firm stand with reference to Welsch's unsatisfactory workmanship. This controversy would not have assumed its present proportions if the employer had taken a firm stand immediately after the accident and fired Welsch forthwith. It was difficult for the union, in rallying to the assistance of one of its members, to comprehend why the employer would want to postpone the day of reckoning by giving Welsch an additional one week 'lay-off' if his work was unsatisfactory to the point of necessitating his permanent separation from employment."

Neither party sought the assistance of the National Labor Relations Board at any time. After the issuance of the injunction on June 4, 1958, the parties agreed to arbitrate the issue of Welsch's discharge (St. 9-10, T. 6, Exhibit 11) and on November 7, 1958 some five months after the strike, the arbitrators rendered their de-

cision that Welsch's work had been unsatisfactory, that this unsatisfactory work was the reason for his discharge on May 27, and that he was not entitled to reinstatement with the respondent (Exhibit 12).

After trial, the Court granted judgment for the plaintiff in the sum of $6,501.60, based on the legal conclusion that "The defendant's picketing of plaintiff's premises was illegal and coercive." (T. 117-119). On appeal by the union, the Washington Supreme Court affirmed the judgment on two totally different theories; first, in tort, that the strike was an attempt to force the respondent to forego the exercise of a right expressly provided by the agreement, and secondly, in contract, that even though a no-strike provision could not be implied from the agreement, the strike nevertheless constituted a violation of the contract. The Court dismissed from consideration §301 of the Taft-Hartley Act on the ground that §301 was solely a jurisdictional provision and did not affect the substantive law to be applied to the enforcement of contracts.

The Court dismissed the pre-emption argument with a determination that the strike and picketing did not fall within the protection of §7 or the prohibition of §8 of the Taft-Hartley Act. This Court's decision in *San Diego Building Trades Council v. Garmon*[4] was distinguished on the ground that "in that case [Garmon] the cause had proceeded through the courts on the assumption that it was an unfair labor practice."

[4]*San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.ed. (2d) 775, 79 S.Ct. 773 (1959)

B. How Federal questions were presented.

Lack of State court jurisdiction by reason of the Taft-Hartley pre-emption was raised at the outset of the trial by Defendant's Memorandum of Authorities, Point IV (R. 35-37). After trial and before judgment, defendant filed a Motion for Dismissal Notwithstanding Court's Memorandum Decision challenging the Court's jurisdiction on the basis of the *Garmon* decision which had just been handed down (T. 102). After argument and further briefs, the Court denied this motion (R. 120). The pre-emption issue was argued to the State Supreme Court in Petitioner's Opening Brief (T. 123, pp. 12-26) and in Petitioner's Reply Brief (T. 125, pp. 5-10).

Although respondent argued to the trial court that the strike was a breach of contract (T. 62-64), the trial court imposed liability on a tort basis and appeared to ignore the breach of contract aspect (T. 117). Respondent's first reference to or mention of §301 of the Taft-Hartley Act was in its brief to the Washington Supreme Court (T. 124, pp. 27-29). Petitioner in its Reply Brief argued that §301 established substantive federal law and that respondent must sustain his contract action, if at all, under §301 rather than local common law (T. 125, pp. 13-15). We then argued that the strike was not a violation of contract within the meaning of §301 (T. 125, pp. 15-21) and cited federal decisions and the legislative history of §301 to this point.

In its opinion, the State Supreme Court discussed the

pre-emption questions and the breach of contract questions, deciding (a) that Taft-Hartley pre-emption did not apply to this action, (b) that §301 did not affect the substantive contract law to be applied, and (c) that the strike was a contract violation even though no promise not to strike could be implied from the labor contract. All issues raised in this Petition were specifically presented in the briefs to the Washington Supreme Court and were discussed in that Court's opinion and decided adversely to petitioner.

REASONS FOR GRANTING PETITION

I. PRE-EMPTION

A. The conclusions reached by the Washington Supreme Court regarding pre-emption are directly contrary to the decision of this Court in *San Diego Building Trades Council v. Garmon*.[3]

The Washington Supreme Court, focusing on only a portion of the *Garmon* opinion,[3] indicates in the opinion below that Taft-Hartley pre-emption cannot be invoked against state jurisdiction except where the State Court finds that the case is one "in which it is clear [or] in which it may be fairly assumed that the activity is protected by §7 or prohibited by §8 of the national labor relations act (sic)." (T. 128-129, Appendix A, p. 4). The opinion then quotes a portion of those two sections (omitting §8(d)) and finds that since the strike and the picketing in this case did not fall within the protection

[3] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.ed. (2d) 775, 79 S.Ct. 773 (1959)

or prohibitions of these two sections, the State Court properly took jurisdiction of the action. It is submitted that this is an inversion of the jurisdictional standards set forth in *San Diego Building Trades Council v. Garmon*.

In the *Garmon* case this Court made it clear that if the union's activity is "arguably" or "potentially" subject to either §7 or §8 of the Taft-Hartley Act, state jurisdiction must yield to the National Labor Relations Board, at least until that Board has determined that the Act does not apply to the activities involved. In the instant case, a union's strike and picketing to reinstate a discharged member to his former job appears *prima facie* to be a protected union activity. The only doubt cast on this protection is a term of the collective bargaining contract which reserves to the employer the right to discharge an employee for unsatisfactory work. It is submitted that, except to the extent that §301 of the Act gives courts jurisdiction, the legal impact of this contract provision upon these particular strike activities and the application of the factual complex to the contract were matters to be determined initially by the National Labor Relations Board.

If on the one hand the Board should determine that the contract does not prohibit such a strike, then the strike is an activity protected by the Taft-Hartley Act and cannot be made the subject of a state court suit. If on the other hand the Board should determine that the contract implied a promise not to strike for the purposes and in the manner done here, then the question arises as to

whether this economic strike constituted a union unfair labor practice pursuant to §8(b)(3) as defined in §8(d)(4) of the Act, in that it would be viewed as an effort to terminate or modify the contract without complying with the requisite waiting period and notices. The Board has taken the position that an economic strike in the face of a no-strike agreement is an unfair labor practice under §8(b)(3) and §8(d). *United Mine Workers Union* and *Westmoreland Coal Company*, 117 N.L.R.B. 1072 (1957); *United Mine Workers of America* and *Boone County Coal Corp.*, 117 N.L.R.B. 1095 (1957), and see 9 Labor Law Journal 406 (1958).[4] In either view of the contract, it is for the Board, not the court, to make the initial jurisdictional decisions, both factual and legal.

It was stated in the *Garmon* case that in the absence of such a determination by the Board or of compelling precedent applied to essentially undisputed facts, it is not for the courts to decide whether the union's activities are subject to state jurisdiction. No compelling precedent existed to take the instant case out of the purview of §7 and §8 of the Act, and the facts as to the motivation for and the context of the strike were definitely disputed. The Court therefore should have deferred to the jurisdiction of the Board.

---

[4]Enforcement of both of these decisions was denied by the Court of Appeals of the District of Columbia by a decision divided two to one. *Local 9735 U.M.W. v. N.L.R.B.*, 258 F.(2d) 146 (App. D.C. 1958); *International Union, U.M.W. of A. v. N.L.R.B.*, 257 F.(2d) 211 (App. D.C. 1958). It is submitted that until this matter is settled finally, the Board's position on this point is at least arguably correct. Cf. Feinsinger, the National Labor Relations Act and Collective Bargaining, 57 Mich. L.R. 807, 825.

To permit state courts to make the basic factual and legal determinations necessary to give them jurisdiction over strikes and picket lines, as held by the court below, would frustrate national labor policy and would thwart uniformity of treatment. This case does not involve matters of peripheral concern to the Taft-Hartley Act as in *International Association of Machinists v. Gonzales*, 356 U.S. 617, 2 L.ed.(2d) 1018, 78 S.Ct. 923 (1958); U.A.W. *v. Russell*, 356 U.S. 634, 2 L.ed.(2d) 1030, 78 S.Ct. 932 (1958); or *Selles v. Local 174, I.B.T.*, 50 Wn.(2d) 660, 314 P.(2d) 456 (1957) cert. den. 356 U.S. 975, 2 L.ed. (2d) 1149, 78 S.Ct. 1134 (1958). This case concerns a strike and a one-man picket established by a union against an employer on behalf of one of its members—a situation clearly at the center of the area of labor relations intended for regulation by the Taft-Hartley Act. Jurisdiction should not be initially determined by the courts.

B. By characterizing the protected or prohibited activity as a violation of a contractual right, as in this case, state courts can circumvent the exclusive initial jurisdiction of the National Labor Relations Board in most situations where a collective bargaining contract is in force.

The decision below was based on the assumption that there was no promise, express or implied, not to strike or picket. The court nevertheless asserted jurisdiction on the ground that, since the strike "was an attempt to force the respondent to forego the exercise of a right expressly provided by the agreement," it was a violation of that agreement and therefore beyond the protection of §7 of

the Taft-Hartley Act. If such judicial reasoning is permitted to stand, the Board's exclusive jurisdiction to determine whether union activities are protected or prohibited by the Taft-Hartley Act can easily be defeated in situations where the parties are covered by a collective bargaining agreement, because as more and more industries enter into labor agreements, and as such agreements deal in greater and greater detail with employer-employee relations, the more completely will the Board's authority over labor relations be displaced by court control. It is not to be presumed that Congress intended its structure for enforcing national labor policy should be so easily frustrated, *Local 774, I.A.M. v. Cessna Aircraft Co.*, 185 Kans. 183, 341 P.(2d) 989 (1959).

II. VIOLATION OF CONTRACT

A. The opinion below is in direct conflict with the decision of this Court in *Textile Workers Union v. Lincoln Mills*.

The opinion below states:

> "Section 301 of the labor management relations act confers jurisdiction upon lower federal courts to entertain suits based upon violations of labor agreements. We find nothing in the plain language of this statute which can reasonably be interpreted as preempting state jurisdiction, or as affecting it by limiting the substantive law to be applied." (Appendix A, p. 9).

This statement stands squarely contrary to the holding whereby this Court definitely and finally decided that §301 established a substantive body of federal labor law

for enforcement of labor agreements. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 1 L.ed(2d) 972, 77 S.Ct. 912 (1957). In that case this Court stated with reference to suits under §301 (a):

> "Federal interpretation of federal law will govern, not state law. But state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate federal policy. Any state law applied, however, will not be an independent source of private rights." p. 456.

We cited and specifically discussed the *Lincoln Mills* decision to the court below, but the court appears to have ignored it. Having thus too easily disposed of §301, the court below was free to ignore any federal court precedents cited to them on the substantive law of labor contract violations as well as to ignore the Legislative history of §301. The judgment below was not based on §301, but on local tort and contract law.

B. The judgment below enforces local contract law that is incompatible with §301 of the Taft-Hartley Act and that has therefore been preempted by that act.

Pre-emption of local law by §301 would appear to be a necessary logical consequence of the doctrines contained in the *Lincoln Mills* decision and *Garner v. Teamsters, C. & H. Union,* 346 U.S. 485, 98 L.ed. 228, 74 S.Ct. 161 (1953). In the *Garner* case the Court stated:

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of

> the National Labor Relations Act is not to condemn all picketing, but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits."

It would seem, therefore, that this strike was either a violation of a collective bargaining agreement within the meaning of §301 of the Taft-Hartley Act or it was an activity protected by §7 of the Act. To hold otherwise would be to permit states "to impinge on an area of labor combat designed to be free" and thereby to obstruct federal labor policy. No such state obstruction should be allowed here, because a non-violent strike is either (1) a violation of a collective bargaining agreement under §301 and gives rise to an action in the courts; or (2) an unfair labor practice and is the basis of charges before the National Labor Relations Board; or (3) neither a violation nor an unfair labor practice, and therefore within the protection of §7 of the Act, even though by local law, absent the Taft-Hartley Act, such a non-violent strike might be the basis of a contract or tort action. In other words, if a strike is not prohibited by §8 or §301 of the Act, it comes within the protection of §7.

The Court below seeks to justify its conclusion by grounding the judgment on common law tort or common law contract liability, and therefore beyond or apart from

pre-emption by the Taft-Hartley Act. However, it was stated in *Weber v. Anheuser-Busch*, 348 U. S. 468, 99 L.ed. 546, 75 S. Ct. 480 (1955):

> "Certainly if the conduct is eventually found by the National Labor Relations Board to be *protected* by the Taft-Hartley Act, the state cannot be heard to say that it is enjoining conduct for reasons other than those having to do with labor relations." p. 556.

C. The decision below, in direct conflict with principles followed in decisions of at least three Circuit Courts of Appeal regarding the §301 no-strike issue, holds that it is a contract violation for a union to strike, even though the union never agreed either expressly or by implication not to strike.

The opinion below states:

> "The appellant next contends that the picketing involved in the instant case was not in violation of the collective bargaining agreement, unless the agreement expressly or impliedly contained a no-strike provision. We disagree."

In the present-day approach to this problem, courts search the language of the contract to determine whether or not the intent of the contracting parties was to bar strikes and under what circumstances they were intended to be barred. *United Construction Workers v. Haislip Baking Co.*, 223 F.(2d) 872 (CCA 4, 1955) cert. den. 350 U. S. 347; *Lewis v. Benedict Coal Corp.*, 259 F.(2d) 346 (CCA 6, 1958), affirmed as to contract interpretation by equally divided Court: 361 U. S. 459, 4 L.ed.(2d) 442, 80 S. Ct. 489 (1960); *U. M. W. A. v. N. L. R. B.*, 257 F. (2d) 211, (App. D. C. 1958). In each of these cases the

respective court examined the wording and context of the labor contract to determine whether the words implied an agreement not to strike. In all but *U. M. W. A. v. N. L. R. B.*, the Court found that the agreement implied a no-strike provision. In the *U. M. W. A.* case, the Court held that no such intent was to be implied, and therefore the strike was not a violation of the contract. Thus, it is clear that courts will not import strike prohibition to a labor contract unless the terms of the agreement express or imply such a prohibition.

The legislative history of §301 accords with this view. Both Majority and Minority Reports of the Senate Committee on Labor and Public Welfare affirm that no-strike clauses would be an item to be included in or excluded from a labor agreement as a result of collective bargaining. Sen. Rep. 105, Part 1, 80th Cong., 1st Sess. (1947) pp. 17-18. Sen. Minority Report 105, Part 2, 80th Cong., 1st Sess. (1947) p. 22.

III. THIS STRIKE WAS NOT A VIOLATION OF THIS COLLECTIVE BARGAINING AGREEMENT WITHIN THE MEANING OF §301.

A. No intent to prohibit strike against a discharge of a union member appears in this contract.

Article II of the contract provides:

> "The Employer *reserves* the right to discharge any man in his employ if his work is not satisfactory." (Emphasis added).

Thus the contract is written in terms of *reservation* of

right by the employer, rather than *the granting* of a right to the employer. The employer reserved the same right that he would have had in the absence of the contract and against the exercise of which right the Union would have been entitled to strike and picket. It is difficult to see how this reservation gives rise to a strike prohibition.

Moreover, the first paragraph of Article XIV of the contract makes express provision against suspension of work during the existence of arbitration proceedings concerning the interpretation of a contract. (It is to be noted that such a provision is omitted from the second paragraph of Article XIV providing for arbitration of other matters.) If it had been the actual intention of the parties that there should be no work-stoppage by reason of a disputed discharge, it is reasonable to assume that the same provision would have been expressed in Article II.

B. The purposes of the Taft-Hartley Act dictate that strike prohibitions, unless intended, should not be imported to a contract merely because momentarily convenient.

Express no-strike provisions have been common in labor agreements since the beginning of the union movement and are now common to the point of being normally expressed in collective bargaining agreements, and not casually but frequently in close detail. *Volume 32 Labor Relations Reference Manual,* p. 6; *Labor Relations Reporter LRX 87, Section 14.* In practice a collective bargaining contract does not necessarily express full coverage of all relations between employer and the union.

"It covers only such matters as the parties have been able to agree upon and leaves unresolved such issues as the parties may not have been able to agree upon and with respect to which the law does not require a concession by either party." *United States Steel Corp. v. Nichols*, 229 F.(2d) 396, 399, 56 ALR (2d) 980 (CCA 6, 1956), cert. den. 351 U. S. 950, 100 L.ed. 1474, 76 S. Ct. 846.

The objective of collective bargaining is to reach contractual undertakings arrived at by both parties knowingly and intentionally at the bargaining table. Basic in Congressional labor policy is the philosophy that the free flow of commerce will be fostered by voluntary and equal bargaining resulting in intentional agreements. This policy is frustrated *pro tanto* when consequences are imported to a contract beyond those undertaken by the parties, either expressly or by necessary implication. The decision of the court below openly and forthrightly frustrates this federal policy and ignores common sense by holding petitioner liable for a strike which petitioner never agreed to ban.

IV. WIDESPREAD IMPORTANCE TO INDUSTRIES AND UNIONS OF THE ISSUES DETERMINED IN DECISION BELOW.

A. If the decision below as to pre-emption is allowed to stand, it will bring about lack of uniformity to most interstate labor cases.

This case is a typical example of what occurs when a state court asserts control over a strike and picket line subject to the federal labor acts. An examination of the

reasoning in the trial court's memorandum decision (T. 39-55) and the State Supreme Court's opinion (Appendix A) reveals completely divergent approaches to both the facts and their legal consequences, depending on which court is handling the case. The trial court regarded this as a tort action in which the issue was whether "the inexpert handling of the discharge of Welsch by the employer constitutes legal justification for the illegal picketing of plaintiff's place of business." (T. 47). The picketing was "illegal" in the trial court's view because it was "coercive," that is to say, because it was effective as an economic weapon against the employer.

The State Supreme Court in part converted this tort action into a common law contract action. Even though it did not find a no-strike promise expressed or implied in the labor contract, it held that the strike and picketing was in violation of the contract.

If there can be such diversity of approach between courts of the *same* state, it can be imagined what multiplicity of legal standards and factual interpretations must come out of the several states. If the *instant* case stands for a modification of the former holdings of this Court, and we believe it will, then many of the protections afforded by both §7 and §8 of the Taft-Hartley Act will be gradually rendered worthless, case by case, and the carefully protected uniformity, the very reason for the doctrine of pre-emption, will in this manner certainly be defeated.

B. For certainty in existing labor agreements, and in those to be negotiated, it is essential that the contract and pre-emption questions here in issue be resolved.

Labor and management are entitled to know if a strike can be held a breach of contract in the absence of an undertaking not to strike. The rule set forth in the decision below would bring particular confusion to those contracts containing a limited or conditional no-strike clause, and negotiators of such agreements must know whether the limits or conditions of the no-strike undertakings will be the limits of no-strike prohibitions. Similarly, the parties to an already existing contract need to know whether the strike prohibition extends beyond the limits of those undertaken in the labor agreement.

The Taft-Hartley pre-emption doctrine, bearing as it does on labor's right and obligations under the Act, should be applied as uniformly and predictably as possible. The legality or illegality of a strike is certainly something that should be reasonably clear and definite. In the clash of labor relations, time rarely permits meticulous and protracted study and application of facts to the rules of a diversity of courts and jursidictions. If the prospects of protection, prohibition and liability are confused and dependent upon which of several courts and boards may ultimately pass upon the factual and legal issues, no reasonable forecast or opinion can be given as to the legitimacy or illegitimacy of a strike.

C. The protection afforded employees by §7 of the Taft-Hartley Act will be substantially reduced, should the decision below stand.

Millions of industrial employees in the United States are presently covered by collective bargaining agreements. Of these agreements the Bureau of National Affairs found in 1957 that 87 per cent provided an absolute ban on strikes, 52 per cent provided conditional strike prohibitions, and 11 per cent contained no strike ban. If the doctrine of violation of contract without breach of a promise, express or implied, is allowed to gain currency as a judicial device for thwarting the jurisdiction of the National Labor Relations Board, it could very seriously limit the protections otherwise afforded by §7 to millions of union members.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

February 1, 1961

Of Counsel

MacDonald, Hoague & Bayless
320 Alaska Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LUCAS FLOUR COMPANY, *Respondent*, v. LOCAL 174, TEAMSTERS, CHAUFFEURS, & HELPERS OF AMERICA, an unincorporated association, *Appellant*.	No. 35310 Department One Filed Oct. 13, 1960

This is an appeal from a judgment for the plaintiff in an action for damages, which arose out of the following facts.

The plaintiff, Lucas Flour Company, is a Washington corporation, principally engaged in the wholesale distribution of flour. The plaintiff employed members of the defendant, Local 174, Teamsters, Chauffeurs & Helpers of America, with whom the plaintiff had entered into a collective bargaining agreement on April 1, 1955.

In 1953, the plaintiff had employed one Melvin T. Welsch, who first worked as a truck driver and then as a warehouseman. His work was unsatisfactory in both capacities and on more than one occasion only the intervention of the union forestalled his discharge. On May 12, 1958, Welsch started a fork-lift truck, used in the plaintiff's warehouse, while it was in gear and caused it to run off the end of the warehouse floor onto the railroad tracks four feet below. The truck was extensively damaged and Welsch was injured. While at home recovering from

these injuries, Welsch received the following memo from the plaintiff:

> ". . . The enclosed check covers your second week of vacation. We have decided that it would be better to take next week off for part of your vacation and than [sic] should we be busy the following week I will call you, otherwise take the second week of your vacation and rest . . ."

On the same day, May 23, Welsch went to see Floyd Anderson, business agent and vice-president of Local 174, and stated that he was ready to return to work. Welsch obtained a written release from his doctor pursuant to Anderson's advice. He presented the release to the secretary-treasurer of the plaintiff corporation, who told him to take the week off and that they would call him if they were busy the following week. Welsch reported this to Floyd Anderson who called the plaintiff's plant, and on the morning of May 27, 1958, sent a business agent to the plant. The business agent was informed that Welsch had been discharged for unsatisfactory work, and he reported this to Floyd Anderson by telephone. The business agent then called the plaintiff's employees out on strike and the plant was picketed. The picketing continued until June 4, 1958, when it was terminated by a temporary injunction issued by the superior court for King county. On September 11, 1958, the matter of Welsch's discharge was submitted to arbitration, and on November 11, 1958 the arbitrators made the following findings and award:

> "1. That the work of Melvin T. Welsch was unsatisfactory prior to his discharge, in that he failed

to carry out his prescribed duties of keeping the warehouse clean and rotating the stock of merchandise; during his absences due to illness, he failed to notify the employer as to the reasons or when he expected to return; and failed to exercise proper care in the operation of a fork-lift truck, by starting the same while it was in gear and causing it to fall a distance of four feet from the warehouse floor to the railroad siding, thereby endangering his life and causing extensive damage to the truck.

"2. That such unsatisfactory work was the reason for Melvin T. Welsch's discharge on May 27, 1958.
"• • •

"AWARD

"The Board hereby orders that the discharge of Melvin T. Welsch on May 27, 1958, was justified and that he is not entitled to reinstatement with his former employer, Lucas Flour Company."

The action for damages came on for trial on March 16, 1959, both parties stipulating that the findings of the arbitrators were binding upon them. The trial court took additional evidence on matters which it considered had not been covered by the findings of the arbitrators, and at the conclusion of the trial entered judgment awarding damages, in the amount of $6,501.60, to the plaintiff. The defendant appeals.

The appellant, Local 174, contends the trial court was without jurisdiction because the national labor relations board had exclusive jurisdiction over the controversy:

Appellant cites the recent case of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 3 L. Ed.(2d)

775, 79 S. Ct. 773 (1959), wherein the United States supreme court said;

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act [61 Stat. 140], or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield . . .
>
> "At times it has not been clear whether the particuluar activity regulated by the States was governed by §7 or §8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board . . ."

In that case, the cause had proceeded through the courts on the assumption that it was an unfair labor practice. The instant case is not one in which it is clear, nor in which it may be fairly assumed, that the activity is protected by §7 or prohibited by §8 of the national labor relations act. On the contrary, a reading of the sections makes it clear that the activities here involved fail to come within the purview of either of these sections. Section 7 of the act, 29 U. S. C. A., §157, provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

The collective bargaining agreement in force between

these parties contained the following provision:

> "The Employer reserves the right to discharge any man in his employ if his work is not satisfactory."

The strike in the instant case was in protest against the discharge of an employee for admittedly unsatisfactory work; in clear violation of the agreement. It was an attempt to force the respondent to forego the exercise of a right expressly provided by the agreement. It could scarcely be argued that the same provision of the act, which gives the right to bargain collectively and to enter into collective bargaining agreements, also gives the right to ignore such agreements, or gives the right to do anything which would nullify the effect of such agreements.

The question then remains whether this was a strike which would constitute an unfair labor practice under §8 of the act, 29 U. S. C. A., §158, which provides:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: . . . or (B) an employer in the selection of his respresentatives for the purposes of collective bargaining or the adjustment of grievances;
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uni-

formly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees . . .

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified . . . (C) forcing or requiring any employer to recognize or bargain with a particular labor organization . . . if another labor organization has been certified as the representative . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board . . .

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory . . .

> "(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

From our reading of this section we cannot say that it might be "fairly assumed" that the instant case falls within the purview of any of the subsections of 29 U. S. C. A., §158 (b). Therefore, the test announced in *San Diego Building Trades Council v. Garmon, supra*, when applied to the present facts, does not militate against state court jurisdiction.

However, this is not the sole basis for concluding that this is a case properly within the ambit of state jurisdiction. The respondent brought this action in the superior court of this state to recover for damages incurred as a result of appellant's attempt to coerce the respondent into foregoing his exercise of a contractual right. In *Selles v. Local 174 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 50 Wn.(2d) 660, 314 P.(2d) 456 (1957), this court said:

> "We know that the Federal government has pre-empted the field as to many phases of labor relations, but not as to all. We cannot find from the act, as interpreted by the supreme court, that it was the intention of Congress to deprive a workman of his time-honored right to sue in his own state court for damages resulting from a common-law tort and to relegate him, for sole relief, to this particular Federal agency.
>
> "Under the facts of this case, there is no 'resounding

collision' between the remedies afforded under the act and in the state court. Under the one, the board shall issue a cease and desist order and *may* order reinstatement, with or without back pay. Under the other, the state court may not enjoin or issue a cease and desist order (except in case of violence), and may not order back pay, but it can award damages for a common-law tort. The relief granted by the board, with the exception of the cease and desist order, is entirely discretionary and is exercised to effectuate the policies of the act and, in particular, to prevent unfair labor practices. The relief granted in a common-law tort action is compensation to a plaintiff for damages sustained by reason of the tort.

"Where the relief granted under state procedure is so similar to that granted under the act that a conflict ensues between the two, the conflicting state procedure is excluded. Where such relief is not similar to that afforded under the act, there is no conflict between the state and Federal remedies, and the state procedure survives. . . . Respondent's right to damages, in this case, for a common-law tort, differs from any remedy which the board has power to provide. The state court, therefore, had jurisdiction to entertain the action."

We believe the theory of the *Selles* case is applicable whether the damages are the result of tortious interference with a party's employment or business or the result of depriving that party of a contractual right. It would be unreasonable to conclude that Congress intended to pre-empt the field of labor relations to such an extent that any party, employer, employee or labor organization would be left without a means of obtaining compensation for damages suffered.

Appellant contends, however, that §301 of the labor-management relations act, 29 U. S. C. A., §185, has supplanted common-law interpretation and enforcement of collective bargaining agreements.

Section 301 of the labor management relations act confers jurisdiction upon the lower federal courts to entertain suits based upon violations of labor agreements. We find nothing in the plain language of this statute which can reasonably be interpreted as pre-empting state jurisdiction, or as affecting it by limiting the substantive law to be applied.

The appellant next contends that the picketing involved in the instant case was not in violation of the collective bargaining agreement, unless the agreement expressly or impliedly contained a no-strike provision. We disagree. The collective bargaining agreement existing between the parties to this lawsuit created rights and duties on both sides. One of the principal benefits obtained by entering into a collective bargaining agreement is that each party's rights are clearly defined and established, and in the fact that each may freely and safely exercise these rights. By virtue of the agreement here in question the respondent had the right to discharge any employee for unsatisfactory service. If the appellant could bring coercive economic pressure to bear whenever the respondent should attempt a proper exercise of this right, the collective bargaining agreement would have been merely a worthless gesture, a document to be treated by both parties as though it had never been executed.

The collective bargaining agreement is the cornerstone of successful labor management relations. To hold that either party to such an agreement can disregard its express terms without incurring liability for the consequences would annihilate all progress in this area with a single stroke of the pen. Collective bargaining agreements would be unenforcible by either side, and would create rights without remedies to protect these rights.

The appellant next contends that this court is not justified in sustaining jurisdiction on the basis that the picketing was in breach of contract since the trial court based its judgment solely on tort liability and made no finding of a breach of contract.

From the pleadings, the theory is established that the respondent was injured by the appellant's breach of contract and this theory is clearly supported by the record. Therefore, the rule that the judgment of the trial court will be sustained on any theory established by the pleadings and supported by the proof is applicable. *Lundberg v. The Corporation of Catholic Archbishop of Seattle*, 155 Wash. Dec. 75, 346 P.(2d) 164 (1959); *Guerin v. Thompson*, 53 Wn.(2d) 515, 335 P.(2d) 36 (1959).

Finally, the appellant contends the evidence of lost profits was too speculative and uncertain to show the respondent's damages with reasonable certainty.

We are satisfied that there is substantial evidence in the record to support the finding of the fact of damage to the respondent's business with reasonable certainty, and

the amount of damages awarded was well within the range of the evidence introduced.

Finding no merit in appellant's other assignments of error, the judgment of the trial court must therefore be affirmed.

It is so ordered.

HUNTER, J.

WE CONCUR:

WEAVER, C. J.

MALLERY, J.

HILL, J.

FOSTER, J.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
TUESDAY, NOVEMBER 15, 1960

LUCAS FLOUR COMPANY, *Respondent,* vs. LOCAL 174, TEAMSTERS, CHAUFFEURS & HELPERS OF AMERICA, an unincorporated association, *Appellant.*	JUDGMENT No. 35310 King County No. 521982

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 15th day of November, A.D. 1960, on the motion of Allen, DeGarmo and Leedy, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said Lucas Flour Company have and recover of and from the said Local 174, Teamsters, Chauffeurs & Helpers of America, an unincorporated association, and from Continental Casualty Company, surety to the extent of $300.00, the costs of this action taxed and allowed at Three hundred thirty-six and 92/100 ($336.92) Dollars, and that execution issue therefor. And it is furthur ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Journal 43 at page 468 In the Office of the Clerk of the Supreme Court

APPENDIX C

Section 7 of the Taft-Hartley Act; 29 U. S. C. §157; 61 Stat. 140:

Rights of Employees

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 8 (b) (3) of the Taft-Hartley Act; 29 U. S. C. §158 (b) (3); 61 Stat. 141:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;"

Section 8 (d) of the Taft-Hartley Act; 29 U. S. C. §158 (d); 61 Stat. 142-143:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obliga-

tion of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty

days after such notice is given or until the expiration date of such contract, whichever occurs later: . . ."

Section 301 of the Taft-Hartley Act; 29 U. S. C. §185; 61 Stat. 156-157:

Suits by and against labor organizations

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpena, or other

legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

APPENDIX D

PRIVATE CARRIER AGREEMENT

Terms of Agreement

The following agreement and scale of wages shall be in force and effect on and after April 1, 1955, as between Lucas Flour and Local Union #174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and shall continue in effect until April 1, 1958, and shall continue from year to year thereafter provided either party may open this agreement by giving notice in writing not later than sixty days prior to the expiration date.

General Conditions

ARTICLE I

The Employer agrees to continue to recognize the Union as the sole collective bargaining agent for all employees falling within the jurisdiction of this agreement.

It is further agreed that all Union workmen employed by the Employer shall maintain their membership in good

standing in the Union and that non-union workmen employed shall become members of the Union on or after the thirtieth day following the beginning of employment or the effective date of this agreement, whichever is later. Further, any liberalization from the Union's point of view which may be made in the Union Shop Provision as defined in the Labor Management Relations Act, either by Congressional Amendment or Judicial decision, shall be adopted by the parties and made a part of this agreement.

ARTICLE II

The Employer reserves the right to discharge any man in his employ if his work is not satisfactory.

ARTICLE III

No workman shall be discriminated against for upholding Union principles, and any man who works under the instructions of the Union, or who serves on a committee shall not lose his job or be discriminated against for this reason.

It shall not be a violation of this agreement or cause for discharge for any employee to refuse to cross a picket line in the performance of his duties.

ARTICLE IV

The following days shall be considered holidays: January 1, February 22, May 30, July 4, Labor Day, Thanksgiving Day and December 25, and all regular employees shall be paid for all such holidays regardless upon which day in the week the holiday should fall. If any work is performed by such employee on such holiday, additional

compensation at straight time shall be paid. No employee shall be called on such holiday for less than a full day. When any of the aforementioned holidays fall on Sunday, the Monday following shall be considered the holiday. If a holiday occurs during an employee's vacation, he shall receive holiday pay in addition to his vacation pay.

Five consecutive days of eight consecutive hours, Monday through Friday, inclusive, shall constitute a week's work; time to start when driver arrives at the garage. No driver and/or helper shall work before 7:00 A.M. or after 6:00 P.M. except in cases of emergency and/or by mutual consent between the Employer and Local Union #174. Any work performed before the regular starting time, or after the regular quitting time, shall be considered overtime and shall be paid for at the rate of time and one-half. All Saturday work shall be guaranteed eight (8) hours work at the rate of time and one-half. All Sunday work shall be guaranteed eight (8) hours work at the rate of double time.

Any extra helper or driver working four (4) full consecutive days in five (5) consecutive days (Sundays and holidays excepted) shall be considered a steady man, and shall be paid the same scale of wages as a steady man.

ARTICLE V

All members who have been employed for a period of one (1) year or over shall have one (1) weeks' vacation with pay; for two (2) years or over, two (2) weeks' vacation with pay; and fifteen (15) years of employment, three

(3) weeks' vacation with pay.

All regular employees shall receive pro-rated vacations after the first year of service at the rate of 1/12 of the determined vacation pay for each month of service.

Any employees who have been receiving more favorable vacation privileges prior to the signing of this agreement shall continue to receive them for the duration of this agreement.

ARTICLE VI

Seniority shall prevail in layoffs for all employees after three (3) months' service. In the event of a layoff, the last employee hired shall be the first laid off.

ARTICLE VII

When a regular driver takes out a vehicle, he shall receive a full day's pay. Any regular driver reporting for duty in the morning, waiting subject to orders, shall be paid for one-half day. In computing overtime, for less than fifteen minutes, fifteen minutes shall be allowed; for over fifteen minutes and less than one-half hour, one-half hour shall be allowed; for over one-half hour and less than forty-five minutes, forty-five minutes shall be allowed; for over forty-five minutes and less than one hour, one hour shall be allowed.

ARTICLE VIII

When Employers prescribe wearing apparel for employees, they shall pay for same. It shall bear the Union label. Employees who wear uniforms prescribed by Employers shall pay for the cleaning of same not to exceed

ten cents (10c) per day.

ARTICLE IX

No employee, who prior to the date of this agreement was receiving more than the rate of wages designated in this agreement for the class of work in which he is engaged, shall suffer a reduction in the rate of wages from the application of this agreement.

ARTICLE X

EFFECTIVE APRIL 1, 1955

All regular employees shall be guaranteed a full week's work.

	PER WEEK	PER HOUR OVERTIME
Trucks with Gross License Capacity 20,000 lbs. and under	$86.60	$3.24¾
Over 20,000 lbs.	88.60	3.32¼
Semi Trucks and Trucks and Trailers	90.60	3.39¾
Steady Helpers and Bull Drivers	83.60	3.13½
Extra Helpers and Drivers of Trucks 20,000 lbs. and under	2.16½	3.24¾
Extra Drivers of Trucks over 20,000 lbs.	2.26½	3.39¾

EFFECTIVE APRIL 1, 1956

All regular employees shall be guaranteed a full week's work.

	PER WEEK	PER HOUR OVERTIME
Trucks with Gross License Capacity 20,000 lbs. and under	$89.00	$3.33¾
Over 20,000 lbs.	91.00	3.41¾
Semi Trucks and Trucks and Trailers	93.00	3.48¾
Steady Helpers and Bull Drivers	86.00	3.22½
Extra Helpers and Drivers of Trucks 20,000 lbs. and under	2.22½	3.33¾
Extra Drivers of Trucks over 20,000 lbs.	2.32½	3.48¾

EFFECTIVE APRIL 1, 1957

All regular employees shall be guaranteed a full week's work.

	PER WEEK	PER HOUR OVERTIME
Trucks with Gross License Capacity 20,000 lbs. and under	$91.80	$3.44¼
Over 20,000 lbs.	93.80	3.51¾
Semi Trucks and Trucks and Trailers	95.80	3.59¼
Steady Helpers and Bull Drivers	88.80	3.33
Extra Helpers and Drivers of Trucks 20,000 lbs. and under	2.29½	3.44¼
Extra Drivers of Trucks over 20,000 lbs.	2.39½	3.59¼

ARTICLE XI

Night shift premium of fifteen cents (15c) per hour shall be paid for all second shift work performed between the hours of 6:00 P.M. and 7:00 A.M.

As of April 1, 1955, each company shall pay into a Health and Welfare Fund the sum of $10.40 per month for every employee covered by this agreement who worked eighty (80) hours or more in the month of March, 1955, and thereafter shall pay $10.40 per month for each eligible employee, employed eighty (80) hours or more during the preceding month, said payment to be made on or before the tenth (10th) day of each month.

ARTICLE XII

Commencing October 1, 1955, and during continuance of this Collective Bargaining Agreement, the Employer shall pay into the Western Conference of Teamsters Pension Trust Fund on account of each member of the bargaining unit an amount equal to ten cents (10c) for each hour for which compensation is paid to him, said amounts

to be computed monthly. The total amount due for each calendar month shall be remitted in a lump sum not later than ten days after the last business day of each month. The Employer agrees to abide by such rules as may be established by the Trustees of said Trust Fund to facilitate the determination of the hours for which contributions are due, the prompt and orderly collection of such amounts, and the accurate reporting and recording of such hours and such amounts paid on account of each member of the bargaining unit. Failure to make all payments herein provided for, within the time specified, shall be a breach of this agreement.

ARTICLE XIII

In the event of war, declaration of emergency, imposition of civilian wage controls by the U. S. Government during the life of this contract, either party may reopen the same upon thirty (30) days written notice and request renegotiation of matters dealing with wages and hours. Upon the failure of the parties to agree in such negotiations, either party shall be permitted all *lawful* economic recourse to support their request for revisions. If governmental approval of revisions should become necessary, all parties will cooperate to the utmost to attain such approval. The parties agree that the notice provided herein shall be accepted by all parties as compliance with the notice requirements of applicable law so as to permit economic action at the expiration thereof.

ARTICLE XIV

Should any difference as to the true interpretation of

this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said members cannot agree, a third member, who must be a disinterested party shall be selected, and the decision of the said Board of Arbitration shall be binding. It is further agreed by both parties hereto that during such arbitration, there shall be no suspension of work.

Should any difference arise between the employer and the employee, same snall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding.

If any employee is removed from service for any doubtful cause, he shall have a fair and impartial investigation within three days. If found guilty, he shall suffer the penalty, and if not, he shall be paid for his time off at the regular scale of wages.

SIGNED THIS ..... DAY OF.....1955

FOR THE COMPANY:

.....

FOR THE: INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION 174

GEORGE CAVANO, *Secretary-Treasurer*

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAR 9 1961
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM 1960

No. ~~716~~ 30

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated Association,
Petitioner,

vs.

LUCAS FLOUR COMPANY, a Washington corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STUART G. OLES
1308-20 Northern Life Tower
Seattle 1, Washington
Counsel for Respondent

Of Counsel:
EDWARD W. ALLEN
GERALD DEGARMO
GEORGE LEEDY
SETH W. MORRISON
1308-20 Northern Life Tower
Seattle 1, Washington

THE ARGUS PRESS, SEATTLE

In the

Supreme Court of the United States

OCTOBER TERM 1960

No. 716

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated Association,
Petitioner,

vs.

LUCAS FLOUR COMPANY, a Washington corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STUART G. OLES
1308-20 Northern Life Tower
Seattle 1, Washington
Counsel for Respondent

Of Counsel:
EDWARD W. ALLEN
GERALD DEGARMO
GEORGE LEEDY
SETH W. MORRISON
1308-20 Northern Life Tower
Seattle 1, Washington

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Questions Presented	1
Statement of the Case	1
Argument in Opposition to Certiorari	4
1. Jurisdiction	4
2. The conclusions reached by the Supreme Court of the State of Washington are not contrary to the decision of this Court in *San Diego Building Trades Council v. Garmon*	6
3. The decision is not contrary to *Textile Workers Union v. Lincoln Mills*	10
4. Policy considerations	10
Conclusion	11

TABLE OF CASES

Gorman v. Washington University, 316 U.S. 98, 62 S.Ct. 962, 86 L.ed. 1300 (1942) 5, 6, 9

I.A.M. v. Gonzales, 356 U.S. 617, 2 L.ed. (2d) 1018, 78 S.Ct. 923 (1958) 9

Lewis v. Benedict Coal Corp. (C.A. 6, 1958) 259 F.(2d) 346 7

McCarroll v. Los Angeles County (etc.) (Calif. 1957) 315 P.(2d) 322, cert. den. 355 U.S. 932, 2 L.ed. 415 9

W. L. Mead, Inc., 113 N.L.R.B. 1040, 36 L.R.R.M. 1392 (1955) 7, 8

N.A.S.M. v. Stevedores & Longshoremen's Benevolent Soc. (D.C. La. 1920) 265 Fed. 397 7

N.L.R.B. v. Sunset Minerals, (C.A. 9, 1954) 211 F. (2d) 224 7

Safeway Stores v. Retail Clerks Union, 184 Wash. 322, 51 P.(2d) 372 (1935) 7

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L.ed.(2d) 775, 79 S.Ct. 773 (1959) 6, 8, 9, 10

Swenson v. Seattle Central Labor Council, 27 Wn. (2d) 193, 177 P.(2d) 873 (1947) 7

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 L.ed.(2d) 972, 77 S.Ct. 912 (1957) 9, 10

Page

U.M.W.A. v. N.L.R.B. (C.A. of D.C., 1958) 257 F. (2d) 211 7

United Construction Workers v. Haislip Baking Co. (C.A. 4, 1955) 223 F.(2d) 872, cert. den. 350 U.S. 347 7

Weber v. Anheuser-Busch, 348 U.S. 468, 99 L.ed. 546, 75 S.Ct. 480 (1955) 6

COURT RULES

Rule 50, Rules on Appeal, 34A Wn.(2d) 55 5

LAW REVIEWS AND REPORTS

A.L.R.(2d) Series Supplement Vol. 1, p. 112 8

2 A.L.R. (2d) 1278, 1281 8

Cox, Some Aspects of the Labor Management Act of 1947, 61 Harv. L. Rev. 274, 308 (1948) 7

STATUTES AND CONSTITUTIONAL PROVISIONS

Revised Code of Washington 2.04.160 (Laws of 1909, Chapter 24, Section 4) 5

Taft-Hartley Act (29 U.S.C. §§ 157, 158, 185, 61 Stat. 140, 143, 156, 157—§§ 7, 8 and 301) 2, 5, 7, 8, 9, 10

Article IV, Section 2, Washington State Constitution 5

In the

Supreme Court of the United States

OCTOBER TERM 1960

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated Association, *Petitioner*, vs. LUCAS FLOUR COMPANY, a Washington corporation, *Respondent.*	No. 716

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully submits this Brief in opposition to the Petition for a Writ of Certiorari filed by Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America in this cause.

QUESTIONS PRESENTED

Were certiorari granted, the questions presented on the merits would be one or possibly both of the following:

1. Where conduct of a labor union, found by a state court to be tortious, is obviously neither protected by nor condemned by Federal law, may the state court entertain an action for damages arising out of such conduct?

2. Does Federal labor legislation deprive state courts

of jurisdiction of cases involving breach of collective bargaining agreements?

More specifically, does section 301 of the Taft-Hartley Act (granting Federal courts jurisdiction of suits for breach of collective bargaining agreements) deprive the states of such authority or limit the law they may apply in such cases?

However, before these questions arise at all, we respectfully point out that the questions *now* before this Court are more limited, and might be framed as follows:

1. Should this Court grant a writ of certiorari to review the decision of a department of the Supreme Court of Washington (from which decision petitioner did not seek relief *en banc*)?

2. And, in any event, where the state court has granted damages for breach of a labor agreement, should certiorari be granted to review that decision, no Federal or constitutional question having been necessarily decided?

STATEMENT OF THE CASE

Petitioner has set forth its partisan version of the events leading to this dispute. Since the case was tried essentially on the basis of *stipulated* facts, it seems more appropriate to review these. (References to St. are to the Statement of Facts, i.e., transcript of the testimony in the trial court, now on file herein.)

The strike here in question occurred May 28, 1958, and was thereafter enjoined; on petitioner's demand

and pursuant to the collective bargaining agreement the dispute was submitted to arbitration; there were extensive hearings (Exhibit 15, St. 172) resulting in an Award of Arbitrators dated November 7, 1958 (Exhibit 12, St. 112). That Award included factual findings which are binding on both parties to this litigation; the petitioner union so stipulated in open court (St. 18), and this was also the written stipulation between the parties on September 11, 1958 (Exhibit 11, St. 112). The trial judge said, "The case was presented to this court on the basis that the facts found by the arbitrators and set forth in the award of arbitrators are binding and conclusive upon this court" (St. 190). These facts may be summarized as follows:

Melvin T. Welsch was employed by respondent company in 1953, first as a truck driver and then as a warehouseman (Exhibit 12, pages 1 and 2). He was incompetent in both capacities. On one or more occasions respondent was so dissatisfied with Welsch's services that Welsch was fired, but was reinstated because petitioner union threatened to strike (Exhibit 12, page 3), this in spite of the fact that under its contract with the union respondent had a right to discharge an employee whose services were unsatisfactory (Exhibit 1, Article 11). The respondent employer kept Welsch on, fearing reprisals by the union (Exhibit 12, pages 3 and 4). In May, 1958, Welsch started a new fork lift truck while it was in gear, and ran it off respondent's loading platform onto the railroad tracks, with resulting damage to the truck and some injury to himself. Welsch was fired when he tried to return to work on May 27, 1958

(Exhibit 12, pages 5 and 6). The discharge was fully justified; Welsch's work was unsatisfactory, there was a reasonable basis for the employer's dissatisfaction, and respondent acted in good faith in discharging him (Exhibit 12, pages 7 and 8). The strike followed immediately (and, incidentally, involved much more than the "one-man picket" petitioner refers to in its brief; see St. 35-41, 103, 104, 143 *et seq.*),

The sole issue in the lawsuit at the time of trial was respondent's claim of damages (St. 190, 191), based on both tort and breach of contract (not on violation of Federal law, no such violation being alleged or proved).

ARGUMENT IN OPPOSITION TO CERTIORARI

1. Jurisdiction.

Respondent Lucas Flour Company objects to the Petition for a Writ of Certiorari on the ground that petitioner has failed to exhaust its appellate judicial remedies in the State of Washington and herein seeks to review a decision of other than the highest court of that State.

The opinion sought to be reviewed is found as Appendix A to the Petition for a Writ of Certiorari. This was the opinion of a department only, (Department Number One), as appears on its face, and was signed by five of nine Judges of the Supreme Court of Washington. The record does not reveal any, and in fact there was no, petition for rehearing or petition for hearing *en banc* by Local 174. Such petitions, and the departmental procedure generally, are authorized by the Washington State Constitution, the applicable stat-

utes, and by the Rules on Appeal of the Supreme Court of the State of Washington. See Article IV, Section 2, Washington State Constitution; Revised Code of Washington 2.04.160 (Laws of 1909, Chapter 24, Section 4); Rule 50, Rules on Appeal 34A Wn.(2d) 55.

In the case of *Gorman v. Washington University*, 316 U.S. 98, 62 S. Ct. 962, 86 L. ed. 1300 (1942), we find this statement:

> "Upon examination of the record it appears that the decision and judgment brought here for review were rendered by Division One of the Supreme Court of Missouri, which consists of four of the seven judges of the court. It does not appear that the judgment thus rendered has been reviewed by the Supreme Court sitting en banc or that petitioners have made application, as they could have done under § 4 of the 1890 amendments to Article 6 of the state constitution, to transfer the cause to the full court for review."

This situation is duplicated in the cause at hand. This Court went on to say in the *Gorman* case:

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted . . . Hence it is the last state tribunal —here the court en banc—to which the cause could be brought for review which is 'the highest court of a state in which a decision could be had' within the meaning of the jurisdictional statute, regardless of the particular description or designation which may be applied to it by state statutes."

The petition was therefore dismissed; a rehearing was subsequently denied. 316 U.S. 711, 62 S. Ct. 1272, 86 L. ed. 1777. We cannot find that this decision has been limited or overruled. We believe it governs the matter at bar and that the Petition should be dismissed, as a matter of law and also because in principle this Court's jurisdiction should not be invoked until every available remedy below has been sought and denied.

2. The Conclusions Reached by the Supreme Court of the State of Washington Are Not Contrary to the Decision of This Court in *San Diego Building Trades Council v. Garmon*

This is the fundamental argument of petitioner, which may be shortly stated as follows: That in the *Garmon* case, 359 U.S. 236, 3 L.ed.(2d) 775, 79 S.Ct. 773 (1959) this Court held that a state court may not award damages to an employer in a suit brought because of union conduct alleged to be in violation of the Taft-Hartley Act. This Court said, in part (359 U.S. at page 244):

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield."

To the same effect is *Weber v. Anheuser-Busch*, 348 U. S. 468, 99 L. ed. 546, 75 S. Ct. 480 (1955), and cases cited. Petitioner asserts that its conduct in the case at hand was protected by section 7 or condemned by section 8 of the Taft-Hartley Act (it isn't clear which)

and that the state court should have declined jurisdiction, the National Labor Relations Board having exclusive jurisdiction.

The flaw in petitioner's argument is that petitioner does not, and cannot, show how its conduct falls, even remotely, under sections 7 or 8 of the Taft-Hartley Act.

The stipulated facts are that the strike here in question was an effort to coerce an employer into rescinding the discharge of an incompetent employee whom the employer had discharged in good faith and with good cause. Such conduct is coercive and tortious in the State of Washington, within the meaning of such cases as *Swenson v. Seattle Central Labor Council*, 27 Wn.(2d) 193, 177 P.(2d) 873 (1947) and *Safeway Stores v. Retail Clerks Union*, 184 Wash. 322, 51 P.(2d) 372 (1935). Moreover, by the view of most courts, including the Federal courts, such conduct constitutes a breach of a subsisting contract, at least if the contract contains (as here) a compulsory arbitration clause. *N.A.S.M. v. Stevedores & Longshoremen's Benevolent Soc.* (D.C. La. 1920) 265 Fed. 397; *N.L.R.B. v. Sunset Minerals*, (C.A. 9, 1954) 211 F.(2d) 224; *United Construction Workers v. Haislip Baking Co.* (C.A. 4, 1955) 223 F.(2d) 872, cert. den. 350 U.S. 347; *Lewis v. Benedict Coal Corp.* (C.A. 6, 1958) 259 F.(2d) 346. For a contrary view, see *U.M.W.A. v. N.L.R.B.* (C.A. of D.C., 1958) 257 F.(2d) 211, and cf. dissent therein. The National Labor Relations Board agrees with the majority; see *W. L. Mead, Inc.* 113 N.L.R.B. 1040, 36 L.R.R.M. 1392 (1955); and see Cox, Some Aspects of the Labor Management Act of 1947, 61 Harv. L. Rev. 274, 308

(1948). For collected cases see 2 A.L.R.(2d) 1278, 1281, and the A.L.R.(2d) Series Supplement, Vol. 1 at page 112. The Supreme Court of Washington therefore could, and did, rest its decision in the present case, upholding a modest award of damages, on *either* tort *or* breach of contract, and not on any violation of Federal law. Nor *could* it rely on Federal law.

Petitioner's conduct was neither protected by section 7 nor condemned as an unfair labor practice by section 8 of the Taft-Hartley Act.

As to section 7, which protects conduct of a union for mutual aid and protection, the conduct in question is not covered because a) it was in breach of contract, and therefore not protected by the Act, *W. L. Mead, Inc.* 113 N.L.R.B. 1040, *supra;* and b) it wasn't for mutual aid and protection at all but rather for a private whim of the union business agent who called the strike. See Finding of Fact VII (T. 26):

> "The Court, notwithstanding said award (of arbitrators), and over objections of plaintiff's (respondent's) counsel, allowed the introduction of evidence bearing on the good faith of defendant (petitioner) in picketing plaintiff's place of business. The Court expressly finds, from all of said evidence, the picketing was the result of the decision of aforesaid Floyd Anderson (petitioner's business agent); that the defendant has not disputed nor did it dispute at the trial its responsibility for the acts and conduct of said Floyd Anderson; *that said Floyd Anderson was motivated by something other than the union's mutual aid and protection;* and that the defendant union has failed

to produce evidence of sufficient weight to satisfy the burden of proof in support of its affirmative defense that the union acted justifiably under the circumstances." (Emphasis and parentheses added.)

See also part 4 of this Argument.

As to whether petitioner's conduct was condemned by section 8 of the Taft-Hartley Act, a careful examination of that section will fail to reveal any portion which even indirectly condemns petitioner's conduct in this case as an unfair labor practice. Certainly a breach of a labor agreement is not, *per se*, an unfair labor practice. *McCarroll v. Los Angeles County (etc.)* (Calif. 1957) 315 P.(2d) 322, cert. den. 355 U.S. 932, 2 L.ed. 415. As pointed out in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. ed.(2d) 972, 77 S. Ct. 912 (1957), the N.L.R.B. is not the proper forum for disputes arising out of breaches of labor contracts, unless the breaches are also unfair labor practices as defined by Federal law.

This is not to say that by imaginative logic it might not be possible to find something about petitioner's conduct which was remotely covered under sections 7 or 8 of the Taft-Hartley Act. However, a mere argumentative coincidence in the facts with a plausible N.L.R.B. action does not destroy state jurisdiction. *I.A.M. v. Gonzales*, 356 U.S. 617, 2 L.ed.(2d) 1018, 78 S.Ct. 923 (1958). In the *Garmon* case, on which petitioner primarily relies, the adjudication in the state court was not remotely but directly based "on the assumption that the behavior of the petitioning unions

constituted an unfair labor practice" under Federal law. 359 U.S. 236 at page 245.

3. The Decision Is Not Contrary to *Textile Workers Union v. Lincoln Mills.*

The Supreme Court of the State of Washington said that section 301 of the Taft-Hartley Act, while conring jurisdiction upon lower Federal courts to entertain suits for breach of labor contracts, did not preempt state jurisdiction or limit the substantive law to be applied. Petitioner takes exception to the last part of this statement and argues that the case of *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 1 L.ed.(2d) 972, 77 S.Ct. 912 (1957), *supra,* held that "Federal interpretation of federal law will govern, not state law." The quoted portion simply refers to what law a *Federal* district court will apply in interpreting *Federal* law in a section 301 case. It does not say, nor does the Taft-Hartley Act direct, what law the state courts will apply in matters properly before them. The argument, however, is academic. If there is any Federal common law on what constitutes a breach of a labor contract, then the rule applied in the case at hand is fully in accord therewith (see comments under part 2 of this Argument).

4. Policy Considerations.

Petitioner contends that public policy protects a union in using economic sanctions in good faith efforts to defend its members' jobs. However, this was factually not the situation here. The trial court said (St. 201):

> "Considering all of the factors, including the demeanor of the various witnesses on the witness stand, their apparent candor and lack of candor, and the reasonableness of the stories that are related, the evidence preponderates in favor of the plaintiff's position that Mr. Anderson (the union business agent who ordered the strike) was not motivated by, nor did he even believe that he was attempting to enforce compliance with the seniority provision of the contract or any other provision of the contract." (Parenthetical portion added).

The union, in short, asserts that it has some fundamental right to disregard its contract and require the employer to do its will, contract or no!

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be dismissed for want of jurisdiction, or should be denied.

Respectfully submitted,

STUART G. OLES
1308-20 Northern Life Tower
Seattle 1, Washington
Counsel for Respondent

Of Counsel:
EDWARD W. ALLEN
GERALD DEGARMO
GEORGE LEEDY
SETH W. MORRISON
1308-20 Northern Life Tower
Seattle 1, Washington

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAR 13 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. ~~350~~ 50

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
an unincorporated Association,
Petitioner,

v.

LUCAS FLOUR COMPANY, a Washington corporation,
Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

Of Counsel:
MacDonald, Hoague & Bayless
320 Alaska Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Counsel for Petitioner

METROPOLITAN PRESS AND WESTERN

SUBJECT INDEX

	Page
Jurisdiction	1
The judgment below is a final judgment of the highest court of the State of Washington	1
Mutual Aid and Protection	4
Appendices:	
Appendix A, Constitution of the State of Washington	App. p. 1
Appendix B, Statutes of the State of Washington	App. p. 1
Appendix C, Rules Peculiar to the Business of the Supreme Court	App. p. 4

TABLE OF CASES

Gorman v. Washington University, 316 U.S. 98, 86 L.ed. 1300 (1942) 4

Horn v. State of Washington, cert. den. without prejudice, 358 U.S. 900, 3 L.ed.(2d) 150, 79 S.Ct. 225 (1958); 52 Wn.(2d) 613, 328 P.(2d) 159 3

Hoy v. Rhay, cert. grt'd 361 U.S. 959, 4 L.ed.(2d) 541, 80 S.Ct. 597 (1960); 54 Wn.(2d) 508, 342 P.(2d) 607 (1959) 3

Market Street R. Co. v. Railroad Com. of Cal., 324 U.S. 548, 551, 87 L.ed. 1171, 1177 (1945) 3-4

Pethoud v. State of Washington, cert. den. 359 U.S. 949, 3 L.ed.(2d) 682, 79 S.Ct. 734 (1959); 53 Wn.(2d) 276, 332 P.(2d) 1092 (1958) 3

Puget Sound Power & Light Co. v. King County, 264 U.S. 22, 68 L.ed. 541 (1924) 2

Ross v. Schneckloth, cert. grtd. 357 U.S. 575, 2 L.ed.(2d) 1547, 78 S.Ct. 1387 (1958), 51 Wn.(2d) 893, 318 P.(2d) 975 (1957) 3

IN THE

Supreme Court of the United States

October Term 1960

No. 716

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated Association,

Petitioner,

v.

LUCAS FLOUR COMPANY, a Washington corporation,

Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The judgment below is a final judgment of the highest court of the State of Washington

Article IV, §2 of the Washington Constitution (Appendix A) provides that the Supreme Court shall consist of five judges but that the legislature may increase the number of judges and "may provide for separate departments of said court." Pursuant to this provision the legislature increased the number of judges to nine and authorized the court to sit in two departments, named departments one and two (R.C.W. 2.04.120; Appendix B). The Chief Justice sits in both departments (Rule 6, Appendix C). Each department is empowered "to hear and determine causes and all questions arising therein, subject to the provisions in relation to the court en banc." The Chief Justice together with any two associate judges, or any four associate judges are given discretion to order a

cause to be heard en banc after a departmental decision (R.C.W. 2.04.150). An en banc hearing is granted as a matter of the court's discretion when the issues are considered sufficiently important to warrant it. No party has a RIGHT to an en banc hearing any more than he has a right to a rehearing of the appeal before the rendering department.

R.C.W. 2.04.160 provides that if no petition for rehearing is filed "the decision of a department shall become final thirty days from the date of its filing," unless during such thirty days an en banc hearing is ordered on the court's own initiative. The judgment of the department is, in the absence of a rehearing, a final judgment of the Supreme Court of the State of Washington as fully as if it were signed by all nine judges. In effect, the departmental structure of the Washington Supreme Court is no different from the very common state provision that a majority of the State Supreme Court shall constitute a quorum.

The United States Supreme Court had occasion to discuss the Washington Supreme Court's present department arrangement in *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22, 68 L.ed. 541 (1924). There it was said (pp. 24-25):

> "Under the law of Washington a decision of a department of the supreme court does not become final until thirty days after it is filed, during which a petition for rehearing may be filed. If no hearing is asked for, or no order entered for a rehearing en banc, in thirty days the decision becomes final."

While this jurisdictional question has never been raised, this Court has on numerous occasions taken jurisdiction of petitions for a writ of certiorari to the Washington Supreme Court where the judgment was rendered by that court sitting in department and no petition for rehearing had been filed. The most recent of such cases are: *Hoy v. Rhay*, cert. granted 361 U.S. 959, 4 L.ed.(2d) 541, 80 S.Ct. 597 (1960); 54 Wn.(2d) 508, 342 P.(2d) 607 (1959); *Horn v. State of Washington*, cert. den. without prejudice, 358 U.S. 900, 3 L.ed.(2d) 150, 79 S.Ct. 225 (1958); 52 Wn.(2d) 613, 328 P.(2d) 159; *Pethoud v. State of Washington*, cert. den. 359 U.S. 949, 3 L.ed.(2d) 682, 79 S.Ct. 734 (1959); 53 Wn.(2d) 276, 332 P.(2d) 1092 (1958); *Ross v. Schneckloth*, cert. grtd. 357 U.S. 575, 2 L.ed.(2d) 1547, 78 S.Ct. 1387 (1958), 51 Wn.(2d) 893, 318 P.(2d) 975 (1957).

The judgment below represents a full and effective determination of the litigation from which there was no appeal to another state court. All matters presented to the court were passed on by the five-judge court without dissent, and there was nothing to be argued in a petition for rehearing that had not already been fully argued in the briefs. A petition for rehearing would have been a repetitive and useless act resulting in pointless delay. As this Court stated in *Market Street R. Co. v. Railroad Com. of Cal.*, 324 U.S. 548, 551, 89 L.ed. 1171, 1177 (1945):

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court

> to reopen and revise its judgment . . . Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one."

The structure of the Supreme Court in the State of Washington is not to be confused with the entirely different procedure followed in the State of Missouri and described in the case of *Gorman v. Washington University*, 316 U.S. 98, 86 L.ed. 1300 (1942), relied upon by respondent. The Constitution of the State of Missouri provides that a litigant shall have an appeal from a divisional decision to an en banc court as a matter of right when a federal question is involved. Thus, under the Missouri Constitution, the division is not "the highest court of the state in which a decision could be had," inasmuch as a higher en banc hearing is provided as a matter of right for the purpose of passing on federal questions. The cited case is inapposite.

It is therefore submitted that this Court has jurisdiction to grant certiorari on this petition.

MUTUAL AID AND PROTECTION

We are compelled to correct a misconception created by respondent's Brief in Opposition (Resp. Br. 8). Respondent tries to indicate that the trial court found that the picketing was in some manner not for the mutual aid and protection of the union and its members. In Finding of Fact V (Tr. 115), the Court expressly found:

> "The picketing was for the purpose of compelling

the plaintiff to rehire one of its employees, Mr. Welsch, a union member."

All parties admitted that this was the purpose—in fact, respondent's entire case is based on what it terms the Union's "effort to coerce an employer into rescinding the discharge of an incompetent employee" (Resp. Br. 7). It would seem to be respondent's position that when a union calls a strike to restore one of its members to his job, this is not for mutual aid and protection. Respondent did not make this argument to the court below, and the court below did not base its decision on any such theory. A reading of that opinion shows clearly that the strike was to force Welsch's reinstatement and that was the totality of the facts in this respect. This petition presents no factual disputes, all such matters having been clearly determined—for the most part by stipulation.

Respectfully submitted,

Of Counsel

MacDonald, Hoague & Bayless
320 Alaska Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Counsel for Petitioner

APPENDICES

APPENDIX A

Constitution of the State of Washington

ARTICLE IV—The Judiciary

§2 SUPREME COURT. The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum, and pronounce a decision. The said court shall always be open for the transaction of business except on non-judicial days. In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time and may provide for separate departments of said court.

APPENDIX B

Statutes of the State of Washington

Revised Code of Washington

R.C.W. 2.04.120 Two departments—Quorum

There shall be two departments of the supreme court, denominated respectively department one and department two. The chief justice shall assign four of the associate judges to each department and such assignment may be changed by him from time to time; *Provided*, That the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the chief justice. The chief justice may sit in

either department and shall preside when so sitting, but the judges assigned to each department shall select one of their number as presiding judge. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions in relation to the court en banc. The presence of three judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of three judges shall be necessary to pronounce a decision in each department: *Provided*, That if three do not concur, the cause shall be reheard in the same department or transmitted to the other department, or to the court en banc.

R.C.W. 2.04.150 Apportionment of business—En banc hearings

The chief justice shall from time to time apportion the business to the departments, and may, in his discretion, before a decision is pronounced, order any cause pending before the court to be heard and determined by the court en banc. When a cause has been allotted to one of the departments and a decision pronounced therein, the chief justice, together with any two associate judges, may order such cause to be heard and decided by the court en banc. Any four judges may, either before or after decision by a department, order a cause to be heard en banc.

R.C.W. 2.04.160 Finality of departmental decision—Rehearings

The decision of a department, except in cases otherwise

ordered as hereinafter provided, shall not become final until thirty days after the filing thereof, during which period a petition for rehearing, or for a hearing en banc, may be filed, the filing of either of which, except as hereinafter otherwise provided, shall have the effect of suspending such decision until the same shall have been disposed of. If no such petition be filed the decision of a department shall become final thirty days from the date of its filing, unless during such thirty-day period an order for a hearing en banc shall have been made . . . The effect of granting a petition for a rehearing, or of ordering a cause once decided by department to be heard en banc, shall be to vacate and set aside the decision. Whenever a decision shall become final, as herein provided, a judgment shall issue thereon.

R.C.W. 2.04.170 En banc hearings—Quorum—Finality of decision

The chief justice, or any four judges, may convene the court en banc at any time, and the chief justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision in the court en banc: *Provided*, That if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court en banc shall be final except in cases in which no previous decision has been rendered in one of the departments, and in such cases the decision of the court en banc

shall become final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges . . .

APPENDIX C

Rules Peculiar to the Business of the Supreme Court

RULE 6 Two Departments—Assignment of Judges

The court is divided into two departments, denominated respectively, Department One and Department Two. The Chief Justice shall assign four of the associate judges to each department, and such assignment may be changed by him from time to time, provided that the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or, if no such agreement is made, as ordered by the Chief Justice.

The Chief Justice shall sit in both departments and shall preside when so sitting.

Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions in relation to the court *en banc*.

The presence of four judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of four judges shall be

necessary to pronounce a decision in each department.

RULE 7 Apportionment of Business—Order for hearings en banc

The Chief Justice shall from time to time apportion the business to the departments, and may, in his discretion, before a decision is filed in the office of the clerk, order any cause pending before the court to be heard and determined by the court *en banc*.

Any four judges, at any time before the filing of a decision in the office of the clerk by a department, may order a cause to be heard *en banc*.

RULE 15 Hearings en banc—Quorum—Finality of decision

The Chief Justice, or any four judges, may convene the court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision of the court *en banc: Provided*, That if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court whether rendered *en banc* or by a department shall be final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the

effect of suspending the decision until disposed of by the concurrence of five judges: *Provided*, That if for any cause five judges shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect any time after its filing and prior to such thirty-day period upon being in writing approved by six judges of such court. Whenever a decision shall become final as herein provided, a judgment shall issue thereon. *Provided*, That where a decision goes into effect in less than thirty days from the date of its filing, the judgment shall not be final as to the amount of the costs of the action taxed and allowed. The costs on appeal shall be computed and taxed as provided in Rules on Appeal 55. The costs as thus finally taxed will then be included in a supplemental judgment.

Rules on Appeal

RULE 50 Petitions for rehearing

Any party to an appealed case may, after an opinion has been filed, present to the court, in the manner and time as hereinafter provided, a petition for rehearing.

Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed. No more than one petition shall be filed by the same party. The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined.

When a rehearing is granted, the clerk shall notify counsel for the respective parties thereof.

When an answer to a petition for rehearing is called for by the court, the clerk shall mail to the attorney of the party from whom the answer is required a copy of the original petition, with a request that he file an answer thereto within fifteen days and serve a copy thereof on opposing counsel.

Three copies each of the petition for rehearing and of the answer thereto, if called for, shall be filed with the clerk.

Petitions for rehearing and answers thereto may be printed, mimeographed, or typewritten. If a petition for rehearing be granted, the court may require additional copies of the petition, answer and briefs to be supplied in the manner indicated by the court.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
AUG 21 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. [redacted]50

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
an unincorporated Association,
Petitioner,

v.

LUCAS FLOUR COMPANY, a Washington corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

Of Counsel
MacDonald, Hoague & Bayless

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Counsel for Petitioner

METROPOLITAN PRESS AND WESTERN

IN THE

Supreme Court of the United States

October Term, 1960

No. 716

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated Association,

Petitioner,

v.

LUCAS FLOUR COMPANY, a Washington corporation,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

Of Counsel
MacDonald, Hoague & Bayless

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Counsel for Petitioner

SUBJECT INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	1
Questions Presented	2
A. Federal pre-emption of tort action	2
B. Violation of Contract	3
Statutory Provisions Involved	4
Statement of Facts	4
Decisions Below	8
Summary of Argument	9
Argument	13
Introduction	13
I. Pre-emption of tort liability jurisdiction	14
A. The conclusions reached by the Washington court are directly contrary to the decisions of this Court	14
B. The instant strike was subject to Board regulation or protection in accordance with the Taft-Hartley Act	16
II. Violation of Contract	23
A. The opinion on which the court below bases its judgment is in direct conflict with the decision of this Court in *Textile Workers Union v. Lincoln Mills*	25
B. Where local contract law is incompatible with federal law as enacted in §301 of the Taft-Hartley Act, it is pre-empted by §301	26
C. The judgment of the court below as to violation of contract is incompatible with federal law as enacted in §301	28

Page

1. The purposes and history of §301 dictate that strike prohibitions are not to be imported to a labor agreement unless the terms of the agreement show an intent to prohibit strikes 28

2. A proper application of federal law shows that this strike was not prohibited 34

D. This Court should apply §301 instead of remanding to state court to apply federal law 38

Conclusion 42

TABLE OF CASES

Amalgamated Meat Cutters, etc. v. Fairlawn Meats, Inc., 353 U.S. 20, 1 L. ed.(2d) 613, 77 S. Ct. 604 (1957) 15

Amalgamated Association v. Wisconsin Employment Relations Board, 340 U.S. 383, 95 L. ed. 364, 71 S. Ct. 359 (1951) 14

Central States Coop. v. Watson Bros. Transp. Co., 165 F.(2d) 392 (CA 7, 1947) 24

Charles Dowd Box Co., Inc. v. Courtney et al, No. 641, 1960 Term 23

Cusano v. National Labor Relations Board, 190 F.(2d) 898 (CA 3, 1951) 17

Fafnir Bearing Co., 73 N.L.R.B 1008, 1009-1011 (1947) 19

Ford Motor Co. and United Automobile Workers, 6 Lab. Arb. 799, 801 31

Garner v. Teamsters C & H Union, 346 U.S. 485, 98 L. ed. 228, 74 S. Ct. 161 (1953) 15, 22, 26

Guss v. Utah Labor Relations Board, 353 U.S. 1, 1 L. ed.(2d) 601, 77 S. Ct. 598 (1957) 15

Page

International Association of Machinists v. Gonzales, 356 U.S. 617, 2 L. ed.(2d) 1018, 78 S.Ct. 923 (1958) 15, 22

International Union v. O'Brien, 339 U.S. 454, 94 L. ed. 978, 70 S. Ct. 781 (1950) 15

Lewis v. Benedict Coal Corp., 259 F.(2d) 346 (CCA 6, 1958), aff'd as to contract interpretation by equally divided Court: 361 U.S. 459, 4 L. ed.(2d) 442, 80 S. Ct. 489 (1960) 32, 41

Maistro Plastics Corp. v. National Labor Relations Board, 350 U.S. 270, 100 L. ed. 309, 76 S. Ct. 349 (1956) 19, 33

McCarroll v. Council of Carpenters, 49 Cal.(2d) 45, 304 P.(2d) 781 (1957) 26

Mitchell v. Maurer, 293 U.S. 237, 79 L. ed. 338 (1934) .. 24

National Electric Products, 80 N.L.R.B. 995, 999-1000 (1948) 19

National Labor Relations Board v. Globe Wireless, Ltd. 193 F.(2d) 748 (CA 9, 1951) 17

National Labor Relations Board v. Insurance Agents, 361 U.S. 477, 4 L. ed.(2d) 454, 80 S. Ct. 419 (1960) .. 19

National Labor Relations Board v. J. I. Case Co., 198 F.(2d) 919 (CA 8, 1952); cert. den. 345 U.S. 917, 97 L. ed. 1351, 73 S. Ct. 729 (1953) 17

National Labor Relations Board v. Lion Oil Co., 352 U.S. 282, 1 L. ed.(2d) 331, 77 S. Ct. 330 (1957) 19, 33, 41

National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 82 L. ed. 1381, 58 S. Ct. 644 (1938) 17, 32

National Labor Relations Board v. McCatron, 216 F. (2d) 212 (CA 9, 1954); cert. den. 348 U.S. 943, 99 L. ed. 738, 75 S. Ct. 365 (1955) 17

Page

National Labor Relations Board v. Peter Cailler Kohler Swiss Chocolates Co., 30 F.(2d) 503, 505-506 (CA 2, 1942) 16

National Labor Relations Board v. Rockaway News Supply Co., 345 U.S. 71, 97 L. ed. 832, 73 S. Ct. 519, 31 A.L.R.(2d) 511 (1953) 18, 41

National Labor Relations Board v. Sands Co., 306 U.S. 332, 334, 83 L. ed. 682, 59 S. Ct. 508 (1939) .. 18, 41

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L. ed.(2d) 775, 79 S. Ct. 773 (1959) 14, 15, 22

Selles v. Local 174, etc., 50 Wn.(2d) 660, 314 P.(2d) 456 (1957); cert. den. 356 U.S. 975, 2 L. ed.(2d) 1149, 78 S. Ct. 1134 (1958) 21

Summit Mining Corp. v. National Labor Relations Board, 260 F.(2d) 894, 897 (CA 3, 1958) 17

Teamsters Union v. Mead, Inc., 230 F.(2d) 576 (CCA 1, 1956) 32

Teamsters Union v. Oliver, 358 U.S. 283, 3 L. ed.(2d) 312, 79 S. Ct. 297 (1959) 15

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 L. ed.(2d) 972, 77 S. Ct. 912 (1957) 25, 31, 39

U.A.W. v. Russell, 356 U.S. 634, 2 L. ed.(2d) 1030, 78 S. Ct. 932 (1958) 15

U.M.W.A. v. N.L.R.B., 257 F.(2d) 211 (App. DC. 1958) 33

United Construction Workers v. Haislip Baking Co., 223 F.(2d) 872 (CCA 4, 1955); cert. den. 350 U.S. 847, 76 S. Ct. 87 (1955) 32

United Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656, 98 L. ed. 1025, 74 S. Ct. 883 (1954) 15

Page

United Mine Workers and Boone County Coal Corp., 117 N.L.R.B. 1095 (1957) 20

United Mine Workers and Westmoreland Coal Company, 117 N.L.R.B. 1072 (1957) 20

United States v. Corrick, 298 U.S. 435, 80 L. ed. 1263 (1936) 24

United States Steel Corp. v. Nichols, 229 F.(2d) 396, 399, 56 A.L.R.(2d) 980 (CA 6, 1956); cert. den. 351 U.S. 950, 100 L. ed. 1474, 76 S. Ct. 846 35

United Steel Workers v. American Mfg. Co., 363 U.S. 564, 4 L. ed.(2d) 1403, 80 S. Ct. 1343 (1960) 31

Weber v. Anheuser-Busch, 348 U.S. 468, 99 L. ed. 546, 75 S. Ct. 480 (1955) 27

TABLES OF STATUTES

29 USC Sec. 157, 158, 185, 61 Stat 140, 143, 156, 157; §§7, 8 and 301 of Taft-Hartley Act 4

TEXTBOOKS AND REPORTS

H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess. 297, 337 29

9 Labor Law Journal 406 (1958) 29

Labor Relations Reporter, LRX 87, Section 14 29

Vol. 32, Labor Relations Reference Manual, page 6 28

Page

S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 16 ..... 29, 30

Sen. Minority Report 105, Part 2, 80th Cong., 1st Sess., p. 22 30

Thayer, Collective Bargaining Patterns in Spokane County, Washington (1952), pp. 176-187 29

Feinsinger, The National Labor Relations Act and Collective Bargaining, 57 Mich. L. Rev. 807, 825 20

IN THE

Supreme Court of the United States

October Term, 1960

No. 716

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated Association,

Petitioner,

v.

LUCAS FLOUR COMPANY, a Washington corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONER

CITATIONS TO OPINIONS BELOW

The memorandum opinions of the Superior Court of the State of Washington for King County are unreported and are set forth in the record (R. 157-174). The opinion of the Washington Supreme Court is reported in 156 Wash. Dec. 935, 356 P.(2d) 1, and is in the record (R. 192-200).

JURISDICTION

The judgment of the Supreme Court of Washington was entered on November 15, 1960 (R. 200-201). The petition was filed February 13, 1961, and was granted April 3, 1961. The jurisdiction of this court is invoked under 28 USC Sec. 1257 (3), since the rights, privileges and immunities specially set up and claimed under 29 USC Sec. 157, 158 and 185 have been denied.

QUESTIONS PRESENTED

Respondent conducts a flour brokerage business admittedly affecting interstate commerce. Petitioner union struck and maintained a one-man picket at respondent's warehouse for eight days in protest against the discharge of a union member employed by respondent. Some months thereafter it was determined retroactively by arbitration that the employee's work had been unsatisfactory and that such unsatisfactory work had been the reason for his discharge. The collective bargaining agreement between petitioner and respondent did not contain a no-strike clause applicable to this situation but did provide:

> "The Employer reserves the right to discharge any man in his employ if his work is not satisfactory."

Neither party at any time applied to the National Labor Relations Board for relief in connection with this strike. The questions presented are:

A. Federal pre-emption of tort action.

(1) Did the Washington Supreme Court's determination that this strike was neither protected by §7 nor prohibited by §8 of the Taft-Hartley Act[1] justify its assumption of jurisdiction of this action in the absence of any such determination by the National Labor Relations Board?

(2) Except for a suit under §301 of the Act, does not the National Labor Relations Board have exclusive primary jurisdiction to determine whether this labor agreement removed this strike from the protection of §7 or the prohibitions of §8 of the Tart-Hartley Act?

---

[1]61 Stat 136-158, 29 U.S.C. Secs. 141-187.

(3) Was not this strike, in protest against the employer's firing of a union member, an activity which is arguably protected by §7 or prohibited by §8 of the Taft-Hartley Act?

(4) May the state court award damages in tort for injury caused by this strike in the absence of an initial determination by the National Labor Relations Board that the strike is neither a protected nor a prohibited activity under the Taft-Hartley Act?

B. Violation of Contract.

(5) In the absence of an express or implied no-strike agreement, can this strike constitute a violation of a collective bargaining agreement under §301 of the Taft-Hartley Act?

(6) If the strike was not a violation of contract under §301, did the state court have jurisdiction to award damages for breach of contract under incompatible state doctrines of contract law?

(7) In the absence of an express or implied no-strike agreement, is not a strike in protest against the employer's discharge of a union member an activity protected by §7 of the Taft-Hartley Act?

(8) Has §301 of the Taft-Hartley Act supplanted incompatible substantive law of the State of Washington as to what conduct constitutes a breach of a collective bargaining agreement in an industry affecting interstate commerce?

(9) Was it a violation of this contract (within the meaning of §301) to strike for the purpose of forcing

the reinstatement of a union member who had been discharged for unsatisfactory work, where at the time of the strike the union, on reasonable grounds, contended that the discharge was not because of unsatisfactory work?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are those included in the Labor-Management Relations Act of 1947, as amended (61 Stat 136-158, 29 U.S.C. Secs. 141-187), herein and commonly called the "Taft-Hartley Act." Pertinent sections of the Act are reproduced in the Appendix hereto.

STATEMENT OF FACTS

The respondent is a family corporation engaged in the wholesale distribution of flour with its principal place of business and warehouses located at Seattle, Washington, and is an industry admittedly affecting interstate commerce.[2] At all pertinent times respondent employed truckers and warehousemen who were members of the defendant, Local 174 (R. 40). Respondent had a collective bargaining agreement[3] effective from and after April 1, 1955, containing among other things the following provisions (R. 202-208):

"ARTICLE II

"The Employer reserves the right to discharge any man in his employ if his work is not satisfactory."

"ARTICLE VI

"Seniority shall prevail in layoffs for all employees

[2]Respondent purchases annually approximately $400,000.00 worth of flour and similar products from outside of the State of Washington, representing approximately 60% of its annual purchases of such products (R. 27-29).

[3]This was a standard contract that petitioner had executed with approximately 475 employers in the city of Seattle (R. 134).

after three (3) months service. In the event of a layoff, the last employees hired shall be the first laid off."

"ARTICLE XIV

"Should any difference as to the true interpretation of this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said members cannot agree, a third member, who must be a disinterested party, shall be selected, and the decision of the said Board of Arbitration shall be binding. It is further agreed by both parties hereto that during such arbitration, there shall be no suspension of work.

"Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding."

On May 12, 1958, "Jack" Welsch, a member of Local 174 and an employee of respondent for over five years (R. 212), started a new fork lift truck while it was in gear and ran it off respondent's platform onto the railroad tracks, with resulting damage to the truck and injury to himself (R. 215). As a result he stayed at home under doctor's care for two weeks (R. 163, 215). Welsch was entitled to two weeks' annual vacation with pay, but had been accustomed to working the full 52 weeks of the year and drawing double pay for two weeks (R. 163, 215). One week of vacation had been given him in April, 1958, and under this arrangement he was entitled to receive a second week's vacation pay by the end of April, 1958, the anniversary of his original employment (R. 137, 163). On Friday, May 23, 1958, respondent delivered to Welsch,

while he was still off work, a check for the second week of vacation, together with a note (R. 137, 163, 219) stating as follows:

> "Memo from
> "NICK LUCAS 5-23-58
> "Jack:
>
> "The enclosed check covers your second week of vacation. We have decided that it would be better to take next week off for a part of your vacation and than [then] should we be busy the following week I will call you, otherwise take the second week of your vacation and rest.
>
> "[signed] Pete"

On the same day, Welsch went to Floyd (Russ) Anderson, business agent and vice-president of Local 174, and stated he was ready to go back to work (R. 138). Anderson advised him to get a written release from his doctor and show it to the respondent (R. 112). On the succeeding Monday, Welsch obtained a written release from his doctor (R. 138) which he showed to Pete Conom, secretary-treasurer of the respondent, who told him to take that week off and that if they were busy the next week they would call him (R. 138, 163). That same day the Union business agent unsuccessfully protested this layoff over the phone to the respondent (R. 117-119, 154, 164).

The next morning, May 27, 1958, petitioner sent a business agent with Welsch to the respondent's plant to "see what the problem was" (R. 119-120, 139, 147). Respondent's representative opened the meeting by stating that Welsch was discharged for unsatisfactory work (R. 39, 148, 140, 164). This was the first indication by the

respondent to either Welsch or a union representative that respondent was contemplating discharging Welsch (R. 164, 190, 119). Thereupon, the business agent reported this fact to the union hall by telephone and Russ Anderson forthwith sent a picket sign to the business agent and within a short time thereafter a one-man picket (R. 120, 141-142, 160) was established at respondent's plant and the employees went out on strike (R. 40, 59). The trial court found that "[t]he picketing was for the purpose of compelling the plaintiff to rehire one of its employees, Mr. Welsch, a union member" (R. 187). The strike continued for eight days, after which it was terminated pursuant to a temporary injunction issued in this action (R. 3-4).

As to the cause of the strike, the trial court stated (R. 164):

> "The employer was undecisive in its attitude toward Welsch and did not take a firm stand with reference to Welsch's unsatisfactory workmanship. This controversy would not have assumed its present proportions if the employer had taken a firm stand immediately after the accident and fired Welsch forthwith. It was difficult for the Union, in rallying to the assistance of one of its members, to comprehend why the employer would want to postpone the day of reckoning by giving Welsch an additional one week 'layoff' if his work was unsatisfactory to the point of necessitating his permanent separation from employment."

Neither party sought the assistance of the National Labor Relations Board at any time. After the termination of the strike on June 4, 1958, the parties agreed to arbi-

trate the issue of Welsch's discharge (R. 23, 209) and on November 7, 1958, some five months after the strike, the arbitrators rendered their decision that Welsch's work had been unsatisfactory, that this unsatisfactory work was the reason for his discharge on May 27, and that he was not entitled to reinstatement with respondent (R. 218).

DECISIONS BELOW

After trial, the state trial court issued a memorandum decision indicating that it would grant judgment for the plaintiff in the sum of $6,501.60 (R. 157-171). The application for a permanent injunction was abandoned as moot (R. 159). The union made a motion to dismiss the complaint notwithstanding the oral opinion (R. 175) by reason of the holding in *San Diego Building, etc., v. Garmon*,[4] which had been rendered by the United States Supreme Court after the trial in this action. The motion was denied and judgment entered (R. 191, 190). The judgment was based on the legal conclusion that:

> "The defendant's picketing of the plaintiff's premises was illegal and coercive." (R. 189)

On appeal by the union, the Washington State Supreme Court affirmed the judgment apparently on two separate theories: First, in tort, that the strike was an attempt to force the respondent to forego the exercise of a right expressly provided by the collective bargaining agreement, and secondly, in contract, even though a no-strike provision was not implied from the agreement, that the strike nevertheless constituted a violation of the contract.

---

[4] *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 3 L. ed. (2d) 775, 79 S. Ct. 773 (1959)

The court dismissed from consideration §301 of the Taft-Hartley Act on the ground that §301 was solely a jurisdictional provision and did not affect the substantive law to be applied to the enforcement of contracts (R. 199).

The court dismissed the pre-emption argument with a determination that

> "[t]he instant case is not one in which it is clear, nor in which it may be fairly assumed, that the activity is protected by §7 or prohibited by §8 of the national labor relations act." (R. 195)

This court's decision in *San Diego Building Trades Council v. Garmon* was distinguished on the ground that "in that case [Garmon] the cause had proceeded through the courts on the assumption that it was an unfair labor practice."

SUMMARY OF ARGUMENT

The conduct in this case which the state trial court and the Supreme Court of Washington determined to be unlawful under state law, and for which judgment was awarded respondent, consisted of a strike and peaceful picketing to protest respondent's discharge of an employee whom respondent considered unsatisfactory. Although not free from doubt, the court below apparently rested its determination of unlawfulness upon the alternative grounds, first, of tort as an attempt to force the respondent to forego the exercise of a right expressly provided by the agreement, and secondly, as a breach of contract on state contract law principles in the absence of a no-strike clause express or implied in the contract.

As to the tort ground, our position is that the National

Labor Relations Board had initial exclusive jurisdiction to determine whether the strike was an activity protected by §7 or prohibited by §8 of the Taft-Hartley Act, and that until the Board determined that the conduct was neither protected nor prohibited, the state court could not entertain jurisdiction of the tort action. Absent the contract, there is no question but that a strike to force reinstatement of a discharged employee is protected by the Act and cannot be made the subject of a tort action, regardless of state law. The contract merely constituted an additional factor to be considered by the Board in determining whether the activity involved was protected, prohibited, or unregulated by federal law. The Board frequently considers the legal impact of a collective bargaining agreement upon the factual and legal complex of a strike, when it is determining the propriety or impropriety of the strike, and it had primary exclusive jurisdiction to do so in the present situation. Thus the tort jurisdiction of the state court over this strike was preempted by the Act.

As to the possibility of a breach of contract, §301 vests federal courts with jurisdiction over actions for violation of labor contracts in industries affecting interstate commerce. We take no position as to the question whether state courts share this jurisdiction or whether it is exclusively in federal courts. We do assert that in breach of labor contract actions federal law must be applied and that incompatible local law must give way to federal law as embodied in §301. Our position in this regard is almost necessarily correct since otherwise the same contract would be subjected to interpretation and enforcement in accordance with two conflicting standards. It would thus result

in direct local impingement on an area of labor relations which Congress has sought to regulate.

The court below expressly applied local contract law unaffected by the substantive law of §301. It stated that this strike constituted a violation of the contract and that a no-strike provision, express or implied, was not necessary to such a holding.

We submit that the purposes and history of §301 dictate that strike prohobitions are not to be interpreted from a labor agreement unless the terms of the agreement show an intent to prohibit strikes. Congress was fully aware of no-strike provisions and indicated that it intended them to be one of the items to be excluded from or included in a labor agreement as the result of collective bargaining. The intent of the parties as expressed in the agreement is to be carried into effect in actions under §301. The existence of an arbitration procedure in the agreement is not conclusive of an intent to prohibit strikes, even though it is often and properly said that the no-strike clause is the *quid pro quo* for the arbitration clause. Certainly no one would maintain that an arbitration procedure was to be implied from a contract solely because of the existence of an express no-strike promise. In enforcing labor agreements under §301, courts have searched the language of the agreement to determine from that language whether it was in fact the intent of the parties that strikes be barred and under what circumstances they were intended to be barred. If such is done in this case, it will be apparent that no such intent can be derived from Local 174's agreement.

In this agreement it was provided that "the employer reserves the right to discharge any man" for unsatisfactory work. To "reserve" means to retain what one had rather

than to gain a new right. Thus, the employer retained the same right to discharge that he already had, absent the contract, and against the exercise of which the union would have been entitled to strike and picket. It is submitted that a strike prohibition cannot be inferred from this clause.

As to the arbitration clauses, the contract contains an express provision against work stoppages during arbitration as to the interpretation of the contract. The provision for arbitration of other differences between labor and management omits any such prohibition. Thus the wording of the arbitration provision shows an intent to retain the right to strike in disputes as to non-interpretative matters. This intent should be carried out, if the substantive law of §301 is applied to the *instant* case.

We urge this court to apply federal law to this case rather than sending it back to the state court for them to apply it because:

(1) The substantive law embraced in §301 is yet to be formed and when formed must harmonize with the entire structure of federal labor policy as embodied in the Taft-Hartley Act and other federal labor laws. A state court, largely unfamiliar with the aims and outlook of federal labor policy, is ill-suited to lay out the guide lines of §301.

(2) These matters have been argued fully to the court below and it cannot be expected that its opinion as to contract law in terms of §301 would differ materially from the opinion below which was in terms of general contract law.

(3) A decision by the court below would not be of much significance to courts confronted with §301 actions.

(4) This court has the entire record before it and is

in as good a position to render a decision as the court below. The interpretative issue will almost necessarily be decided by this court, whether expressed or unexpressed. Courts and litigants should have the benefit of that decision.

(5) The implied no-strike problem is an important one which arises frequently. Clarity in this area will constitute a substantial aid to industrial peace, as well as to lower courts and the National Labor Relations Board.

ARGUMENT

Introduction

While the trial court based its judgment solely in tort, the Washington Supreme Court sustained the judgment on the ground that the strike and picketing was both a tort and a violation of contract. Thus the court characterized the strike as "an attempt to force the respondent to forego the exercise of a right expressly provided by the agreement" and "an attempt to coerce the respondent into foregoing his exercise of a contractual right," and referred to the damages as "the result of depriving that party of a contractual right." This sounds in tort. The state Supreme Court then went on to sustain the judgment as based upon a common-law breach of contract unaffected, as the opinion states, by §301 of the Taft-Hartley Act, and in the absence of an express or implied no-strike provision. It is submitted that, if the strike is viewed as a tort, the National Labor Relations Board had initial exclusive jurisdiction, and if it is considered as a violation of contract it is governed by §301 of the Act and applicable federal labor law, the Board having no jurisdiction of contract violations. For this reason, clarity requires that the tort and contract aspects of this action be discussed separately.

I

PRE-EMPTION OF TORT LIABILITY JURISDICTION

A. The conclusions reached by the Washington court are directly contrary to the decisions of this Court.

The Washington Supreme Court, focussing on only a portion of the *Garmon* opinion,[5] indicates in its opinion that Taft-Hartley pre-emption cannot be invoked against state jurisdiction except where the state court finds that the case is one "in which it is clear [or] in which it may be fairly assumed that the activity is protected by §7 or prohibited by §8 of the National Labor Relations Act." (R. 195). The opinion then quotes a portion of those two sections (omitting §8(d)) and finds that, since it could not be "fairly assumed" that the *instant* case fell within the protection or prohibitions of these two sections, the state court properly took jurisdiction of the action. It is submitted that this is an inversion of the jurisdictional standard set forth in *San Diego Building Trades Council v. Garmon.*

The test that this Court laid down in *Garmon* is that if the activity in question is "arguably" or "potentially" either protected by §7 or prohibited by §8 of the Act, the National Labor Relations Board is vested with primary exclusive jurisdiction. This exclusion precludes state control over the controversy whether that control is exercised through an administrative board, criminal prosecutions, a labor injunction, a damage award, or an anti-trust decree. *Amalgamated Association v. Wisconsin Employment*

[5]*San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 3 L. ed. (2d) 775, 79 S. Ct. 773 (1959)

Relations Board, 340 U.S. 383, 95 L. ed. 364, 71 S. Ct. 359 (1951); *International Union v. Obrien*, 339 U.S. 454, 94 L. ed. 978, 70 S. Ct. 781 (1949); *Garner v. Teamsters, C. & H. Union*, 346 U.S. 485, 98 L. ed. 228, 74 S. Ct. 161 (1953); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L. ed. (2d) 775, 79 S. Ct. 773 (1959); *Teamsters Union v. Oliver*, 358 U.S. 283, 3 L. ed. (2d) 312, 79 S. Ct. 297 (1959). Congressional intent to vest the Board with exclusive control over all aspects of labor-management relations affecting interstate commerce except for suits under §301 and §303, was thoroughly explored and effectuated in decisions of this court throughout the development of the pre-emption doctrine under the Taft-Hartley Act. *Garner* case, *supra; Guss v. Utah Labor Relations Board*, 353 U.S. 1, 1 L. ed. (2d) 601, 77 S. Ct. 598 (1957); *Amalgamated Meat Cutters, etc., v. Fairlawn Meats, Inc.*, 353 U.S. 20, 1 L. ed. (2d) 613, 77 S. Ct. 604 (1957); *Garmon* case, *supra*. In supporting the Board's pre-emptive jurisdiction, this court has pierced through technical or legalistic concepts and looked to the substance of the state action to see whether it is in fact an exercise of control over labor-management relations, *Garmon* and *Oliver* cases, *supra*, or is merely an exercise of state jurisdiction over primarily local incidents which only incidentally relate to labor-management relations, *U. A. W. v. Russell*, 356 U.S. 634, 2 L. ed. (2d) 1030, 78 S. Ct. 932 (1958); *International Association of Machinists v. Gonzales*, 356 U.S. 617, 2 L. ed. (2d) 1018, 78 S. Ct. 923 (1958); *United Construction Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 98 L. ed. 1025, 74 S. Ct. 883 (1954) cases.

Unless such a realistic approach is adhered to, federal labor policy, as implemented by the National Labor Relations Board, will be frustrated or circumvented by the judicial inventiveness of state courts.

B. The instant strike was subject to Board regulation or protection in accordance with the Taft-Hartley Act.

The instant case concerns an economic strike and a one-man picket established by a union against an employer in protest against the discharge of one of its members—a situation clearly at the center of the area of labor-management relations intended for regulation by the Taft-Hartley Act. Concerted union activity to protest the discharge of an employee has long been recognized as a protected activity. Section 7 of the Act expressly guarantees to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection," and §13 similarly prohibits the application of the Act "to interfere with or impede or diminish in any way the right to strike . . ." except where "specifically provided for." It was long ago stated by Judge Learned Hand, in explaining the impact of this federal regulation in the situation presented by this case, in *National Labor Relations Board v. Peter Cailler Kohler Swiss Chocolates Co.*, 30 F.(2d) 503, 505-506 (CA 2, 1942):

> "When all other workmen in a shop make common cause with a fellow workman over his separate grievance and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or pro-

> tection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."

It is also settled law that "The fact that the discharges being protested were lawful . . . does not preclude a strike in protest thereof being protected." *Summit Mining Corp. v. National Labor Relations Board*, 260 F.(2d) 894, 897 (CA 3, 1958). Indeed, it has frequently occurred in board cases involving this problem that the strike is precipitated by a discharge which is valid and proper under the collective bargaining agreement. As the decisions show, however, the strikers are nonetheless protected by the Act, e.g., *Cusano v. National Labor Relations Board*, 190 F.(2d) 898 (CA 3, 1951); *National Labor Relations Board v. McCatron*, 216 F.(2d) 212 (CA 9, 1954); cert. den. 348 U.S. 943, 99 L. ed. 738, 75 S. Ct. 365 (1955); *National Labor Relations Board v. Globe Wireless Ltd.*, 193 F.(2d) 748 (CA 9, 1951); *National Labor Relations Board v. J. I. Case Co.*, 198 F.(2d) 919 (CA 8, 1952) cert. den. 345 U.S. 917, 97 L. ed. 1351, 73 S. Ct. 729 (1953). As this court stated in the early days of the Wagner Act, the lawfulness of a strike under the federal law does not turn on "The wisdom or unwisdom of the men, their justification or lack of it . . ." *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304

U.S. 333, 82 L. ed. 1381, 58 S. Ct. 644 (1938).*

It is, of course, true that the protection which §7 of the Act affords to strikers is withdrawn if the strike is in violation of an existing collective bargaining contract. *Natonal Labor Relations Board v. Rockaway News Supply Co.*, 345 U.S. 71, 80, 97 L. ed. 832, 73 S. Ct. 519, 31 ALR (2d) 511 (1953); *National Labor Relations Board v. Sands Co.*, 306 U.S. 332, 334, 83 L. ed. 682, 59 S. Ct. 508 (1939). For the reasons stated fully in a subsequent part of this brief, we do not believe that this strike was in violation of the contract. But it is not necessary to establish that Local 174 did not violate the contract in order to show that its conduct is subject to the provisions of federal act and therefore to the primary exclusive jurisdiction of the Board. The fact that the general rule which protects strikes is qualified to the extent that the contract may forbid such strikes, serves only to introduce an additional factor which Congress intended the National Relations Board to consider along with the rest of the factual and legal complex of the strike, in its regulation of this kind of situation. The interpretation of the agreement and its effect on the other factual and legal incidents

*The court below characterized the strike in the instant case as "in protest against the discharge of an employee for admittedly unsatisfactory work." (R. 195). It is submitted that this is a misleading characterization. While the union concedes that it cannot now challenge the arbitrators' finding that the employee's work was unsatisfactory, that finding was rendered some five months after the strike. At the time of the strike there was no admission or concession in this respect. On the contrary the trial court found that the employer's "undecisive" attitude toward the employee made it difficult for the union to understand the employer's position in respect to the sudden discharge of an employee for unsatisfactory work after offering him an additional one week "lay off" the night before. (R. 163-164).

surrounding the strike is initially for the Board to determine, not a circumstance which removes the strike from the scope of federal regulation. Cf. *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 4 L. ed.(2d) 454, 80 S. Ct. 419 (1960).

Thus the Board, in dealing with strike situations, frequently must consider whether a collective bargaining agreement operates to make invalid that which would otherwise be valid concerted action, e.g., *National Electric Products*, 80 N.L.R.B. 995, 999-1000 (1948); *The Fafnir Bearing Co.*, 73 N.L.R.B. 1008, 1009-1011 (1947). Particular cases may present the Board with difficult questions in this respect; refinements and distinctions have developed in the decisional law relating to the meaning and scope of collective bargaining agreements as they pertain to strike action, e.g., *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 100 L. ed. 309, 76 S. Ct. 349 (1956); *National Labor Relations Board v. Lion Oil Co.*, 352 U.S. 282, 1 L. ed.(2d) 331, 77 S. Ct. 330 (1957). While these questions have complicated the Board's task in administering the Act, they certainly have not served to remove such cases from federal oversight.

In sum, the present case falls into a well-defined pattern of cases in which the Board has traditionally applied federal policy. Both the character of the strike and the applicability of provisions in the agreement which bear upon the right to engage in the strike are matters with respect to which the Board has evolved, over the years, an elaborate set of governing rules and principles appro-

priate to the complex field in which it operates. In these circumstances, there is no basis whatever for the premise of the decision below that the union conduct in question is not covered by the federal Act. On the contrary, the decision here must be that the federal Act does regulate the activity which the court below found unlawful under state law.

Thus in this case, if the Board had decided that the contract did not prohibit this strike, called for the purposes and under circumstances as found by the Board, the strike would have been an activity protected by §7 of the Taft-Hartley Act and could not have been made the subject of a state court action. If, on the other hand, the Board had determined that the strike was precipitated for a purpose or in a manner prohibited by the contract, then the question would arise as to whether it constituted an unfair labor practice pursuant to §8(b)(3) as defined in §8(d)(4) of the Act, in that it might be viewed as an effort to terminate or modify the contract in respect to discharges, without complying with the requisite waiting period and notifications. *United Mine Workers and Westmoreland Coal Company*, 117 N.L.R.B. 1072 (1957); *United Mine Workers and Boone County Coal Corp.*, 117 N.L.R.B. 1095 (1957), and see 9 Labor Law Journal 406 (1958).[7] Or thirdly the Board might have determined

[7]Enforcement of each of these decisions was denied by the Court of Appeals of the District of Columbia by a decision divided two to one. *Local 9735 U. M. W. v. N. L. R. B.*, 258 F.(2d) 146 (App. D. C. 1958); *International Union, U. M. W. of A. v. N. L. R.B.*, 257 F.(2d) 211 (App. D. C. 1958). It is submitted that until this matter is settled finally, the Board's position on this point is at least arguably correct. Cf. Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 Mich. L. Rev. 807, 825.

that the strike was neither protected nor prohibited by the Act, in which case the state court could assume jurisdiction of this tort action.

But whatever the ultimate decision of the Board, or the view which it held as to the propriety of the strike, it was for the Board, and not the court, to make the initial jurisdictional decision in the light of its determinations, both factual and legal. To permit state courts to make such jurisdictional determinations in a case involving an economic strike against an employer, as was done by the court below, would frustrate national labor policy and would thwart uniformity of treatment in an area where uniformity is vital.

In its decision the court below seeks to justify its holding by a quotation (R. 197-198) from *Selles v. Local 174, etc.*, 50 Wn.(2d) 660, 314 P.(2d) 456 (1957), cert. den. 356 U.S. 975, 2 L. ed.(2d) 1149, 78 S. Ct. 1134 (1958), in which the Washington Supreme Court sustained state court jurisdiction of an action against a union on the ground that the right to damages for a common-law tort differed from any remedy which the Board had the power to provide and therefore was separate from and not in conflict with Taft-Hartley regulation. In the *Selles* case, judgment was granted to a union member against his union because it had prevented him from obtaining employment in his usual field of endeavor. This judgment could have been properly sustained on the ground that

the union activity on which it was based was merely a peripheral concern of the Labor-Management Relations Act. *International Association of Machinists v. Gonzales*, 356 U.S. 617, 2 L. ed.(2d) 1018, 78 S. Ct. 923 (1958).[8]

A common-law tort damage judgment, when granted as compensation for damage caused by a strike by a union against the employer concerning employment relations, can be as potent a control over that strike and employment relations as an injunction and is therefore repugnant to the exclusive jurisdiction over the contest given by Congress to the National Labor Relations Board. *San Diego Building Trades, etc., v. Garmon, supra.* This repugnance does not arise in two unrelated spheres, as the *Selles* opinion would urge, but constitutes a direct conflict between state and federal policy, in that two law-making sources are attempting to govern the same strike in accordance with conflicting standards. Insofar as remedies form an ingredient of any integrated scheme or regulation, to allow a state to grant a remedy in a situation where the Board would not grant one, accentuates the danger of conflict. The reasoning of the Washington court in the *Selles* case is directly at variance with the holding of this Court in the *Garmon* case and the application of such reasoning by the court below to the case at bar was improper. This Court stated in *Garner v. Teamsters, C. & H. Union*, 346 U.S. 485, 98 L. ed. 228, 74 S. Ct. 161 (1953), page 490:

---

[8]Certiorari was denied by this Court in the *Selles* case one week after the decision in the *Gonzales* case, to which case the petitioner for certiorari in the *Selles* case tied its petition.

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rule to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible and conflicting adjudications as are different rules of substantive law."

II

VIOLATION OF CONTRACT

It is not clear whether an action pursuant to §301 can be brought in state courts as well as federal courts or whether federal court jurisdiction was intended to be exclusive. Since we did not challenge the state court's jurisdiction in this respect, either in the court below or in our Petition for Certiorari, we will not argue either side of this problem. It appears that this question will be answered in *Charles Dowd Box Co., Inc., v. Courtney et al,* No. 641, 1960 Term, which is set for argument just before the instant case. If in that case it is decided that state courts have no jurisdiction over §301 actions, the instant action must fail, even though we have not raised this question heretofore. For the firmly established rule

is that a jurisdictional question may be raised at any stage of a proceeding. *United States v. Corrick*, 298 U.S. 435, 80 L. ed. 1263 (1936); *Mitchell v. Maurer*, 293 U.S. 237, 79 L. ed. 338 (1934); *Central States Coop. v. Watson Bros. Transp. Co.*, 165 F.(2d) 392 (CA 7, 1947). In fact, it is the duty of a reviewing court, on its own volition and without respect to whether the question has been raised by the parties, to examine into the matter of jurisdiction. See *United States v. Corrick, supra*, at page 440, and *Central States Coop. v. Watson Bros. Transp. Co., supra*. Court initiative in this regard is especially necessary where, as here, improper exercise of jurisdiction is likely to effect an impairment of federal substantive law and policy.

If, however, the outcome of the *Dowd Box* case is to establish that state courts have concurrent jurisdiction over §301 cases, still the judgment below must be reversed, since, as will be shown, not only was federal law not applied where it was controlling, but the state law which was applied conflicted with and impaired rights established by federal law. For the purposes of this brief, therefore, we will assume that state courts have jurisdiction of actions brought pursuant to §301.

We do not contend that the National Labor Relations Board has been given pre-emptive jurisdiction over breaches of contract. The history of §301 of the Act shows clearly that Congress considered and rejected that legislative possibility. Our position is that since §301 created a federal cause of action for violation of a labor agree-

ment, that section and the resulting body of law usurped the entire field of breach of labor agreements in industries affecting interstate commerce, and that incompatible local law, whether common law or statutory, whether of general application or specifically directed at labor contracts, must yield to federal law. We will further show that proper application of federal law will result in a dismissal of this action and that hence the money judgment of the state court is an obstruction of federal labor policy.

A. The opinion on which the court below bases its judgment is in direct conflict with the decision of this Court in *Textile Workers Union v. Lincoln Mills*.

The opinion below states (R. 199):

> "Appellant contends, however, that §301 of the labor-management relations act, 29 U.S.C.A., §185, has supplanted common-law interpretation and enforcement of collective bargaining agreements.
>
> "Section 301 of the labor-management relations act confers jurisdiction upon lower federal courts to entertain suits based upon violations of labor agreements. We find nothing in the plain language of this statute which can reasonably be interpreted as pre-empting state jurisdiction, or as affecting it by limiting the substantive law to be applied."

This statement stands squarely contrary to the holding whereby this Court definitely and finally decided that §301 established a substantive body of federal labor law for enforcement of labor agreements. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L. ed.(2d) 972, 77 S. Ct. 912 (1957). In that case this Court stated with reference to suits under §301(a):

"Federal interpretation of federal law will govern, not state law. But state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate federal policy. Any state law applied, however, will not be an independent source of private rights." p. 456.

We cited and specifically discussed the *Lincoln Mills* decision to the court below, but the court appears to have ignored it. Having thus too easily disposed of §301, the court below was free to ignore any federal court precedents cited to them on the substantive law of labor contract violations as well as to ignore the legislative history of §301.

B. Where local contract law is incompatible with federal law as enacted in § 301 of the Taft-Hartley Act, it is pre-empted by § 301.

Since by §301 Congress enacted substantive law to govern violations of collective bargaining agreements, it would appear that it intended this law to pre-empt incompatible local law. For it is implicit in the Act that "for a state to impinge upon the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner v. Teamsters, supra.*[9] As was stated by Justice Traynor in *McCarroll v. Council of Carpenters,* 49 Cal.(2d) 45, 304 P.(2d) 781 (1957):

"It is obvious that in exercising this jurisdiction

[9]As shown *supra* at page 16-17, if this strike was not prohibited by the labor agreement, it was an activity protected by §7 of the Act.

> [of actions under §301] state courts are no longer free to apply state law, but must apply the federal law of collective bargaining agreements, otherwise the scope of the litigants' rights will depend on the accident of the forum in which the action is brought."

If in *San Diego Building, etc., v. Garmon, supra,* a money judgment based on local tort law and a state labor statute was considered an obstruction of federal labor policy, the present money judgment, based on local general contract law constitutes equally a frustration of federal policy, if, as we will show later, federal policy holds that the strike did not constitute a violation of the labor contract. State control over the strike is asserted by a money judgment to exactly the same extent, whether the judgment is founded on contract or tort, and the measure of local impingement on the area of labor combat designed to be free is just as great in either situation. Activities designed to be protected by §7 of the Act are thereby made illegal, and the judgment constitutes a penalty against the union for having engaged in the protective activity.

The court below seeks to justify its conclusion by grounding the judgment in general common law contract liability, and therefore beyond or apart from pre-emption by the Taft-Hartley Act. However, it was stated in *Weber v. Anheuser-Busch*, 348 U.S. 468, 99 L. ed. 546, 75 S. Ct. 480 (1955):

> "Certainly if the conduct is eventually found by the National Labor Relations Board to be *protected* by the Taft-Hartley Act, the state cannot be heard to say that it is enjoining conduct for reasons other

than those having to do with labor relations." p. 480.

C. The judgment of the court below as to violation of contract is incompatible with federal law as enacted in § 301.

1. *The purposes and history of § 301 dictate that strike prohibitions are not to be imported to a labor agreement unless the terms of the agreement show an intent to prohibit strikes.*

The opinion below states (R. 199):

> "The appellant next contends that the picketing involved in the instant case was not in violation of the collective bargaining agreement, unless the agreement expressly or impliedly contained a no-strike provision. We disagree."

Express no-strike provisions have been frequently included in labor agreements since the beginning of the union movement and are now common to the point of being normally expressed in collective bargaining agreements, not casually, but frequently in close detail. The Bureau of National Affairs in 1948, from a survey of 1,300 collective bargaining contracts, found that 80 per cent contained some form of express no-strike clause of which about two-thirds amounted to an absolute ban on stoppages during the life of the contract. The remaining one-third were promises to refrain from work-stoppage until the grievance procedures were exhausted. Volume 32, Labor Relations Reference Manual, page 6. In 1957 the same organization surveyed 400 representative contracts and found that 89% of them contained some form of express no-strike agreement; 37% provided an absolute

ban on strikes and 52% were conditioned on various internal procedures or events. Labor Relations Reporter, LRX 87, Section 14; and see Thayer, Collective Bargaining Patterns in Spokane County, Washington (1952) pp. 176-187. There can be little question but that the 80th Congress was thoroughly familiar with the existence and significance of no-strike provisions.

It is clear that the purpose of Congress in enacting §301 was in large part to provide employers with a remedy for breach of no-strike agreements. As the Senate Committee put it:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts." S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 16. See also H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess. 297, 337.

If we concede, as we must, that the principal object which the sponsors of §301 (a) and (b) sought to reach was unions which breached the no-strike provisions of their agreements, we do *not* concede that Congress considered

every collective bargaining contract as containing such a provision either expressly or by implication. It would have been simple to have provided a statutory prohibition against all strikes during the term of the agreement. No such prohibition was enacted. On the contrary the Senate Committee in discussing §301 stated:

> "It has been argued that the result of making collective bargaining agreements enforceable against Unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract.
>
> "This argument is not supported by the record in the few States which have enacted their own laws in an effort to secure some measure of Union responsibility for breach of contract. Four states—Minnesota, Colorado, Wisconsin and California — have thus far enacted such laws, and, so far as can be learned, no-strike clauses have been continued about as before.
>
> "In any event, it is certainly a point to be bargained over and any Union with the status of 'representative' under the NLRA which has bargained in good faith with an Employer should have no reluctance in including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious." Sen. Rep. 105, Part 1, 80th Cong., 1st Sess. (1947), pp. 17-18.

From this it seems clear that Congress intended that the no-strike clause was an item to be included in or excluded from a labor agreement as a result of collective bargaining. See also Sen. Minority Report 105, Part 2, 80th Congress, 1st Session (1947) p. 22. Such being the case, a strike prohibition is not to be implied merely from the existence

of a collective bargaining contract, as the court below appears to believe.

While it is frequently and properly stated that the no-strike clause is a *quid pro quo* for the arbitration clause, *Textile Workers Union v. Lincoln Mills*, 343 U. S. 448, 455 1 L. ed.(2d) 972, 77 S. Ct. 912 (1957); *United Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 4 L. ed.(2d) 1403, 80 S. Ct. 1343 (1960); *Ford Motor Co. and the United Automobile Workers*, 6 Lab. Arb. 799, 801 (1947), this comment has reference to the issues commonly dealt with at the collective bargaining table and does not apply to the interpretation of an executed agreement which intentionally omits any no-strike provision or provides only a conditional strike prohibition. To suggest that an arbitration provision necessarily implies an unexpressed no-strike promise would deprive the parties of the right to set the terms of their agreement in accordance with the results of their bargaining. The fact that the large majority of contracts contain both arbitration and no-strike clauses does not mean that the two provisions must go hand in hand. It would be as unrealistic to say that an unexpressed prohibition against strikes is to be implied from an arbitration provision standing by itself as to say that an unexpressed arbitration provision is to be implied from a no-strike provision standing by itself.

In enforcing a labor agreement under §301, courts must adhere to the intent of the agreement rather than to any formalized rule that ignores intent. If a contract contains an arbitration procedure but does not show an intent to

eliminate the right to strike, the right to strike should be preserved. §8 (d) of the Act provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." The fact that an unusually strong union can obtain unusually favorable terms does not mean that those terms should be ignored or diluted. §301 of the Taft-Hartley Act did not authorize courts to look into the wisdom of the terms of labor agreements. It authorized the enforcement of agreements resulting from collective bargaining, whether they be wise or unwise, evenly balanced or one-sided. Cf. *N.L.R.B. v. Mackay Radio & T. Co.*, 304 U. S. 333, 344; 82 L. ed. 1381, 1389, 58 S. Ct. 644 (1938). The objective of collective bargaining is to reach contractual undertakings arrived at by both parties knowingly and intentionally. Basic in Congressional labor policy is the philosophy that the free flow of commerce will be fostered by voluntary bargaining resulting in intentional agreements. This policy is frustrated *pro tanto* when consequences are imported to a contract beyond those undertaken by the parties, either expressly or by necessary implication.

In the present-day approach to this problem, courts have searched the language of the contract to determine whether or not it was the intent of the contracting parties that strikes be barred and under what circumstances they were intended to be barred. *United Construction Workers v. Haislip Baking Co.*, 223 F.(2d) 872 (CCA 4, 1955) cert. den. 350 U. S. 847, 76 S. Ct. 87 (1955); *Teamsters Union v. Mead, Inc.*, 230 F.(2d) 576 (CCA 1, 1956);

Lewis v. Benedict Coal Corp., 259 F.(2d) 346, (CCA 6, 1958), affirmed as to contract interpretation by equally divided court: 361 U.S. 459, 4 L. ed.(2d) 442, 80 S. Ct. 489 (1960); *U.M.W.A. v. N.L.R.B.*, 257 F.(2d) 211 (App. D. C. 1958). In each of these cases the court examined the wording and context of the labor contract with particular reference to the wording of the arbitration clause, to determine whether the words implied an agreement not to strike. In all but *U.M.W.A. v. N.L.R.B.*, the Court found that the agreement implied a no-strike provision. In the *U.M.W.A.* case, the court held that no such intent was to be found, and therefore the strike was not a violation of the contract. This Court has shown reluctance to infer that a no-strike provision in a contract was applicable at a time when bargaining was in progress relating to modifications in the contract, *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 1 L. ed.(2d) 331, 77 S. Ct. 330 (1957), and has refused to interpret an all-inclusive no-strike agreement to be applicable to a strike in protest against unfair labor practices. *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 100 L. ed. 309, 76 S. Ct. 349 (1956). In both cases this Court reached this decision because of the intent of the parties to the contract as the Court perceived it. Thus, it is clear that under the Taft-Hartley Act courts will not import strike prohibition to a labor contract unless the terms of the agreement express or imply an intent on the part of the union to agree to such a prohibition.

Unless the intent of the parties to the contract is given effect by courts, negotiators of collective bargaining agreements will not be able to know whether the limits or con-

ditions of no-strike undertakings will indeed establish the limits of the strike prohibitions; likewise parties to an existing agreement will not know whether the strike prohibitions and reservations negotiated in the contract will carry a consequence different from those intended by the parties to the labor agreement. The decision to strike or not to strike commonly must be made quickly and without opportunity for detailed legal research. As long as it is the policy of the law to protect the right to strike, the terms conditioning that right should be as explicit and comprehensible as possible. The only guide to attain this objective is to look to the intent of the parties expressed in or implied from the terms of the agreement.

2. *A proper application of federal law shows that this strike was not prohibited.*

Respondent, in the court below, contended that two provisions in the collective bargaining contract gave rise to an implied agreement to prohibit the strike involved in this suit:

(a) The provision reserving to the employer the right to discharge for unsatisfactory work, and

(b) The arbitration provision.

The court below made no reference to the arbitration provision but relied entirely on the discharge provision.

Article II of the contract (R. 202) provides:

> "The *Employer reserves* the right to discharge any man in his employ if his work is not satisfactory." (Emphasis added.)

This provision is written in terms of *reservation* of right

by the employer, rather than the *granting* of a right to the employer. To reserve means to keep what one had, not to gain a new right. Thus the employer reserved the same right that he already had, absent the contract, and against the exercise of which right the union would have been entitled to strike and picket. It is difficult to see how this employer reservation gives rise to a strike prohibition against the union.

We agree with the court below that one of the reasons motivating the employer to enter the collective bargaining agreement was the hope of avoiding industrial strife. But this does not mean that whenever this hope is frustrated he has a cause of action for breach of contract. The fact that this contract was not as comprehensive as most such agreements and that it dealt with only a fraction of the problems normally covered by labor contracts, does not mean that the Court should fill in the interstices of the agreement with implications which cannot be realistically seen as intended in the agreement. In practice a collective bargaining contract rarely expresses full coverage of all relations between employer and the union. "It covers only such matters as the parties have been able to agree upon and leaves unresolved such issues as the parties may not have been able to agree upon and with respect to which the law does not require a concession by either party." *United States Steel Corp. v. Nichols*, 229 F.(2d) 396, 399, 56 ALR(2d) 980 (CCA 6, 1956), cert. den. 351 U.S. 950, 100 L. ed. 1474, 76 S. Ct. 846. So in this contract, the parties expressly inserted a no-strike provision

applicable to a limited situation not relevant to the instant strike. They made no such provision with reference to Article II. It is submitted that there is no indication of an intent that a strike prohibition should be applicable to the Article II situation.

It might be asked what was the purpose or significance of Article II if it was not intended to imply a no-strike provision. We feel that Article II was put into the contract to assure the employer of his right to discharge an unsatisfactory employee without involving himself in a breach of contract action, despite the seniority provision (Article VI, R. 204), the union shop agreement (Article I, R. 202), or the anti-discrimination provision (Article III, R. 203). While none of these articles of the contract specifically and necessarily militate against the right to discharge for incompetence, each constitutes a substantial limitation on the employer's freedom to discharge or lay-off employees at will. Such limitations on his freedom could well give an employer concern that the right to fire for incompetence was being taken out of his hands. To assure that this was not the intent of the agreement, Article II would serve a definite purpose, without coupling it with an "implied" no-strike provision.

The arbitration clause in the contract is as follows (R. 208):

"ARTICLE XIV

"Should any difference as to the true interpretation of this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said

members cannot agree, a third member, who must be a disinterested party shall be selected, and the decision of the said Board of Arbitration shall be binding. It is further agreed by both parties hereto that during such arbitration, there shall be no suspension of work.

"Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding."

It is to be noticed that the first paragraph makes express provision against suspension of work during proceedings to arbitrate a dispute as to the interpretation of the contract, but that the second paragraph providing for arbitration of other differences omits any such prohibition. It is not contended, nor could it be, that this strike involved a dispute as to the interpretation of the contract. There was no dispute as to the meaning of its language. The dispute concerned whether the discharged employee's work had been satisfactory or not—a dispute as to fact.

This dispute therefore came under the second paragraph of Article XIV, the catch-all arbitration provision. That paragraph omitted any work-stoppage provision. The union showed a willingness to waive the right to strike over the interpretation of the contract but specifically omitted any such waiver of the right to strike on other matters. As to those matters arbitration was available, if desired, but not at the expense of the right to strike. This was a standard contract executed with approximately 465 companies in Seattle (R. 134). A dispute in one plant as

to the interpretation of the contract would presumably affect the interpretation of the contract with many other companies, and therefore as to that, arbitration was preferred over a test of economic strength. The impact of the ordinary non-interpretative dispute would be limited to the parties involved and as to that, the strike was intended to remain available, along with arbitration. One surmises that the right to strike in these matters was retained primarily for the purpose of bringing a few recalcitrant employers in line with the bulk of the 465 as to whom little trouble was anticipated.

Thus the wording of the arbitration clause is in such form as to show an intent to retain the right to strike except as to interpretative disputes. Parties to collective bargaining negotiate from strength and the resulting contract is the reflection of the relative strengths of the parties. If Local 174 was strong enough to get an arbitration provision without giving up the right to strike, courts should leave them with the fruits of their strength, at least until a different policy is promulgated by Congress.

It is therefore submitted that if the intent of parties as expressed in the contract is to govern, and federal law applied to such intent, the strike involved in this action was a protected activity, and the judgment of the court below is an interference and obstruction of the protection afforded by federal law. As such it must fall.

D. This Court should apply § 301 instead of remanding to state court to apply federal law.

While the court below expressly refused to apply

federal law to this contract situation, we submit that no benefit would be derived from remanding it with instructions to apply federal law.

Firstly, the federal law embraced in §301 is yet to be formed even in its broadest outlines. These outlines must be delineated ultimately by this Court so as to establish the necessary guide lines for lower courts to follow. To send it back to the Washington Court with instructions to lay out those guide lines would impose a greater burden than that court should be called upon to bear in the present posture of the law. State courts, primarily occupied with local problems, are largely unfamiliar with the outlook and aims of the Taft-Hartley Act. §301 must be interpreted and applied to conform to the entire structure of federal labor policy as set forth in the Taft-Hartley Act and other federal labor laws. *Textile Workers Union v. Lincoln Mills, supra.* Most aspects of the Taft-Hartley Act never come before state courts, whereas federal courts have been dealing with and have been involved in the development of federal labor policy since before 1937. If the remand in this action were to a federal court, an interpretative decision on remand might be helpful in the development of the body of law surrounding §301. To remand this to the state court for interpretation would result in confusion, without benefit to the parties or to the development of the law.

Secondly, the question as to the implications of the contract with respect to strike prohibitions was argued at length to the court below, which answered it in terms of

general contract law adversely to our position. The Opinion below shows clearly the state court's legal approach to the problems arising out of this agreement and this strike, from the standpoint of general contract law. A further decision from that court in terms of §301 cannot reasonably be expected to differ materially from that approach in the present undeveloped state of the substantive law embraced in §301.

Thirdly, a decision by the state court in terms of §301 and federal law would carry little significance to other lower courts in building a structure of labor contract law, as contrasted to a decision by this Court. Courts, increasingly often confronted with suits under §301, would find an interpretative decision by this Court in the instant case a welcome beacon to guide them in what is presently an uncertain area.

Fourthly, the facts of this case are simple and undisputed. There are no factual determinations to be made upon remand. The record before this Court is complete, and this Court has as full an opportunity to decide this issue as the Court below. The interpretative issue will almost necessarily be decided by this Court, whether expressed in or omitted from the ultimate decision. Courts and litigants should have the benefit of that decision.

Finally, enforcement of no-strike provisions was a matter of primary concern to Congress when it enacted §301. The circumstances from which a strike prohibition will or will not be implied, where not expressed in a contract, is presently a matter of substantial importance and con-

cern in industrial relations. Clarity in this area will constitute a substantial aid to industrial peace, to lower court litigation, and to the National Labor Relations Board.

In *N.L.R.B. v. Lion Oil Co.*, 352 U.S. 282, 1 L. ed.(2d) 331 (1957), this Court decided a problem of contract interpretation which had not been passed on by the Circuit Court of Appeals or by the National Labor Relations Board. The present action is more ripe for decision by this Court than was the *Lion Oil* case, in that the interpretative question was presented to the court below in federal terms and was decided by that court in terms of general state law.

Similarly in its opinion in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 4 L. ed.(2d) 442, 80 S. Ct. 489 (1960), this Court examined at length the terms of a collective bargaining agreement and based a modification of the judgment below on its interpretation of the agreement. In numerous other cases this Court has directly inquired into the legal consequences of labor agreements. *N.L.R.B. v. Rockaway News Supply Co.*, 345 U.S. 71, 97 L. ed. 832, 73 S. Ct. 519, 31 A.L.R.(2d) 54 (1953); *National Labor Relations Board v. Sands Co.*, 306 U.S. 332, 83 L. ed. 682, 59 S. Ct. 508 (1939).

Thus there is ample support, both in reason and in precedent, for this Court to determine whether the legal consequences of this labor contract are such as to warrant a judgment in favor of the respondent pursuant to §301 of the Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Counsel for Petitioner
FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington

Of Counsel
MacDONALD, HOAGUE & BAYLESS

APPENDIX

Section 7 of the Taft-Hartley Act; 29 U. S. C. §157; 61 Stat. 140:

Rights of Employees

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 8 (b) (3) of the Taft-Hartley Act; 29 U. S. C. §158 (b) (3); 61 Stat. 141:

Unfair Labor Practices

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;"

Section 8 (d) of the Taft-Hartley Act; 29 U. S. C. §158 (d); 61 Stat. 142-143:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotia-

tion of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . ."

Section 301 of the Taft-Hartley Act; 29 U. S. C. §185; 61 Stat. 156-157:

Suits by and against labor organizations

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determin-

ing whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
SEP 11 1961
JAMES R. BROWNING, Clerk

No. 50

In the Supreme Court of the United States

OCTOBER TERM 1961

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an Unincorporated Association, *Petitioner*,

vs.

LUCAS FLOUR COMPANY, a Washington Corporation, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF FOR THE RESPONDENT

STUART G. OLES
Counsel for Respondent

1308-20 Northern Life Tower
Seattle 1, Washington

Of Counsels
EDWARD W. ALLEN
GERALD DEGARMO
GEORGE LEEDY
SETH W. MORRESON
1308-20 Northern Life Tower
Seattle 1, Washington

THE ARGUS PRESS, SEATTLE, WASHINGTON

No. 50

In the
Supreme Court of the United States

OCTOBER TERM 1961

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an Unincorporated Association, *Petitioner,*

vs.

LUCAS FLOUR COMPANY, a Washington Corporation, *Respondent.*

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF FOR THE RESPONDENT

STUART G. OLES
Counsel for Respondent
1308-20 Northern Life Tower
Seattle 1, Washington

Of Counsels
EDWARD W. ALLEN
GERALD DEGARMO
GEORGE LEEDY
SETH W. MORRESON
1308-20 Northern Life Tower
Seattle 1, Washington

THE ARGUS PRESS, SEATTLE, WASHINGTON

INDEX

	Page
Statutory and Constitutional Provisions	1
Questions Presented	3
Statement of the Case	4
Summary of Argument	5
Argument	7
1. Jurisdiction	7
2. Deferring to National Labor Relations Board	8
3. Breach of Contract	13
Conclusion	15

TABLE OF CASES

Gorman v. Washington University, 316 U.S. 98, 62 S.Ct. 962, 86 L.ed. 1300 (1942) 7, 8

I.A.M. v. Gonzales, 356 U.S. 617, 2 L.ed.(2d) 1018, 78 S.Ct. 923 (1958) 12

Lewis v. Benedict Coal Corp. (C.A. 6, 1958) 259 F.(2d) 346 ..... 10, 15

McCarroll v. Los Angeles County (etc.) (Calif. 1957) 315 P.(2d) 322, cert. den. 355 U.S. 932, 2 L.ed. 415 11

W. L. Mead, Inc., 113 N.L.R.B. 1040, 36 L.R.R.M. 1392 (1955) 10, 15

N.A.S.M. v. Stevedores & Longshoremen's Benevolent Soc. (D.C. La. 1920) 265 Fed. 397 ..... 10, 14

N.L.R.B. v. Sunset Minerals, Inc. (C.A. 9, 1954) 211 F.(2d) 224 ..... 10, 15

Safeway Stores v. Retail Clerks Union, 184 Wash. 322, 51 P.(2d) 372 (1935) 10

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L.ed.(2d) 775, 79 S.Ct. 773 (1959) 9, 12

Swenson v. Seattle Central Labor Council, 27 Wn. (2d) 193, 177 P.(2d) 873 (1947) 9-10

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 L.ed.(2d) 972, 77 S.Ct. 912 (1957) 11, 13

United Construction Workers v. Haislip Baking Co. (C.A. 4, 1955) 223 F.(2d) 872, cert. den. 350 U.S. 847, 100 L.ed. 754, 76 S.Ct. 87 ..... 10, 14

Page

United Telephone Company, 112 N.L.R.B. 779 (1955) 13

Weber v. Anheuser-Busch, 348 U.S. 468, 99 L.ed. 546, 75 S.Ct. 480 (1955) 9

CONSTITUTIONAL AND STATUTORY PROVISIONS

Laws of 1909, Chapter 24, Section 4 7

Revised Code of Washington 2.04.120 1

Revised Code of Washington 2.04.160 ..... 2, 7

Rule 50, Rules on Appeal, 34A Wn.(2d) 55 ..... 3, 7

Sections 7, 8 and 301, "Taft-Hartley Act," 29 U.S.C. § 185, 61 Stat. 156 ..... 4, 6, 9, 10, 11, 12, 13

Article IV, Section 2, Washington State Constitution 1, 7

OTHER AUTHORITIES

A.L.R.(2d) Series Supplement, Vol. 1 at page 112 10

2 A.L.R.(2d) 1278, 1281 ..... 10, 14

Cox, Some Aspects of the Labor Management Act of 1947, 61 Harv. L. Rev. 274, 308 (1948) 10

H. Conference Rep. No. 510, 80th Congress, 1st Session, page 42 13

In the

Supreme Court of the United States

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an Unincorporated Association, *Petitioner*,

vs.

LUCAS FLOUR COMPANY, a Washington Corporation, *Respondent*

No. 50

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF FOR THE RESPONDENT

STATUTORY AND CONSTITUTIONAL PROVISIONS

Petitioner refers only to the Labor-Management Relations Act of 1947, as amended. Also involved in this case are:

Article IV, Section 2, Washington State Constitution, which reads in part as follows:

> "The legislature may increase the number of judges of the supreme court from time to time and may provide for separate departments of said court."

Revised Code of Washington 2.04.120, which is as follows:

> "*Two departments — Quorum.* There shall be two departments of the supreme court, denominated respectively department one and department two. The chief justice shall assign four of the as-

sociate judges to each department and such assignment may be changed by him from time to time: *Provided,* That the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the chief justice. The chief justice may sit in either department and shall preside when so sitting, but the judges assigned to each department shall select one of their number as presiding judge. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions in relation to the court en banc. The presence of three judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of three judges shall be necessary to pronounce a decision in each department: *Provided,* That if three do not concur, the cause shall be reheard in the same department or transmitted to the other department, or to the court en banc."

Revised Code of Washington 2.04.160, which is as follows:

"*Finality of departmental decision — Rehearings.* The decision of a department, except in cases otherwise ordered as hereinafter provided, shall not become final until thirty days after the filing thereof, during which period a petition for rehearing, or for a hearing en banc, may be filed, the filing of either of which, except as hereinafter otherwise provided, shall have the effect of suspending such decision until the same shall have been disposed of. If no such petition be filed the decision of a

department shall become final thirty days from the date of its filing, unless during such thirty-day period an order for a hearing en banc shall have been made: *Provided*, That if for any cause the chief justice or a majority of the department rendering any decision shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect, and a judgment issue thereon, any time after its filing an dprior to such thirty?day period, upon being in writing approved by the chief justice and any two associate judges who took no part in rendering such decision. The effect of granting a petition and prior to such thirty day period, upon being for a rehearing, or of ordering a cause once decided by department to be heard en banc, shall be to vacate and set aside the decision. Whenever a decision shall become final, as herein provided, a judgment shall issue thereon."

Rule 50, Rules on Appeal, 34A Wn.(2d) 55, reads in part as follows:

"Any party to an appealed case may, after an opinion has been filed, present to the court, in the manner and time as hereinafter provided, a petition for rehearing."

QUESTIONS PRESENTED

1. Should this Court review the decision of a department of the Supreme Court of Washington, from which decision petitioner did not seek relief *en banc*?

2. Where conduct of a labor union, found by a state court to be tortious, is obviously neither protected by nor condemned by Federal law, may the state court entertain an action for damages arising out of such conduct?

3. Does Federal labor legislation deprive state courts of jurisdiction of cases involving breach of collective bargaining agreements? That is, does Section 301 of the Taft-Hartley Act (granting Federal courts jurisdiction of suits for breach of collective bargaining agreements) deprive the states of such authority or limit the law they may apply in such cases?

STATEMENT OF THE CASE

This case was tried on stipulated facts, and petitioner's "Statement of Facts" is therefore largely irrelevant. To quote the trial judge (R. 158):

> "It is clear from the voluntary approval of the parties to the record of arbitration that the parties intended to be bound by the results of the arbitration. . . .
>
> "The case was presented to this court on the basis that the facts found by the arbitrators and set forth in the award of arbitrators are binding and conclusive upon this court."

The record of arbitration (Pl. Ex. 11, R. 209, 210) states:

> "It is further stipulated and agreed that the decision of the three arbitrators when reached shall be final and binding upon all parties hereto. . . . ; Provided, That: in the event the arbitrators are at variance in deciding any issue, the unanimous decision of any two of said arbitrators on said issue shall be final and binding on the parties as to that issue."

The essential facts are therefore not petitioner's carefully selected bits of the trial record to support its

unilateral view of what happened, but rather what the arbitrators decided. Insofar as relevant here, the arbitrators made the following decision (Pl. Ex. 12, R. 211 *et seq.*):

Melvin T. Welsch was employed by respondent company in 1953, first as a truck driver and then as a warehouseman (R. 212, 213). He was incompetent in both capacities. On one or more occasions respondent was so dissatisfied with Welsch's services that Welsch was fired, but was reinstated because petitioner union threatened to strike (R. 213, 214), this in spite of the fact that under its contract with the union respondent had a right to discharge an employee whose services were unsatisfactory. In May, 1958, Welsch started a new fork lift truck while it was in gear, and ran it off respondent's loading platform onto the railroad tracks, with resulting damage to the truck and some injury to himself. Welsch was fired when he tried to return to work on May 27, 1958 (R. 214-216). The discharge was fully justified; Welsch's work was unsatisfactory, there was a reasonable basis for the employer's dissatisfaction, and respondent acted in good faith in discharging him (R. 217, 218). The strike followed immediately (and, incidentally, involved much more than the "one-man picket" petitioner refers to in its brief; see R. 41, 42, 43, 44).

SUMMARY OF ARGUMENT

It is respondent's position that this Court should not review the Supreme Court of Washington's decision at all, because petitioner failed to avail itself of the remedy of seeking a hearing by that court sitting *en*

banc. Such a procedure is authorized by the Washington Constitution and statutes, and as a matter of policy this Court does not entertain proceedings to review unless all remedies are exhausted below.

It is further respondent's position that if the Washington courts ruled on the basis of tortious activity by petitioner union, that activity was not arguably protected by or condemned by Federal law. This Court has held that state courts must decline jurisdiction of matters involving labor relations affecting interstate commerce and defer to the National Labor Relations Board whenever the complained-of activity is either protected or condemned by Federal labor law, and this Court has further stated that if such activity is even "arguably" so protected or condemned, then the National Labor Relations Board is the proper tribunal to determine the questions presented, at least in the first instance. However this Court has *not* ruled, as petitioner apparently feels it *should* rule, that in *every* case involving a labor matter in interstate commerce the state courts lack jurisdiction for any purpose. It is respondent's view that, if it is abundantly clear that conduct in labor relations is neither protected nor condemned by Federal law, a state court may take jurisdiction of the purely local tort or contract relationships brought before it.

It is finally respondent's position that Congress has never purported to deprive the states of their authority to enforce collective bargaining agreements. Section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, 61 Stat. 156 merely creates a new possible forum for such suits —to wit, Federal district courts, and the section is plainly permissive both in language and intent.

ARGUMENT

1. Jurisdiction

The opinion sought to be reviewed was that of a department of the state Supreme Court, (Department Number One), as appears on its face, and was signed by five of nine Judges of the Supreme Court of Washington (R. 192 *et seq.*). The record does not reveal any, and in fact there was no, petition for rehearing or petition for hearing *en banc* by Local 174. Such petitions, and the departmental procedure generally, are authorized by the Washington State Constitution, the applicable statutes, and by the Rules on Appeal of the Supreme Court of the State of Washington. See Article IV, Section 2, Washington State Constitution; Revised Code of Washington 2.04.160 (Laws of 1909, Chapter 24, Section 4); Rule 50, Rules on Appeal 34A Wn.(2d) 55.

In the case of *Gorman v. Washington University*, 316 U.S. 98, 62 S. Ct. 962, 86 L. ed. 1300 (1942), we find this statement:

> "Upon examination of the record it appears that the decision and judgment brought here for review were rendered by Division One of the Supreme Court of Missouri, which consists of four of the seven judges of the court. It does not appear that the judgment thus rendered has been reviewed by the Supreme Court sitting en banc or that petitioners have made application, as they could have done under § 4 of the 1890 amendments to Article 6 of the state constitution, to transfer the cause to the full court for review."

This situation is duplicated in the cause at hand. This Court went on to say in the *Gorman* case:

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted. . . . Hence it is the last state tribunal—here the court en banc—to which the cause could be brought for review which is 'the highest court of a state in which a decision could be had' within the meaning of the jurisdictional statute, regardless of the particular description or designation which may be applied to it by state statutes."

The petition was therefore dismissed; a rehearing was subsequently denied. 316 U.S. 711, 62 S.Ct. 1272, 86 L.ed. 1777. We cannot find that this decision has been limited or overruled. We believe it governs the matter at bar and that the Petition should be dismissed, as a matter of law, and also because in principle this Court's jurisdiction should not be invoked until every available remedy below has been sought and denied.

Petitioner argues (see Petitioner's Reply Brief on Petition for Writ of Certiorari, page 3) that a petition for hearing *en banc* would have been "useless." This of course is speculative—we are told about 4% of such petitions are successful in the State of Washington Supreme Court. Be that as it may, the opportunity to seek hearing before all nine judges of that Court was not taken, and until this is done the petitioner has not exhausted its remedies below.

2. Deferring to National Labor Relations Board

In summary petitioner has asserted that the National Labor Relations Board has "initial exclusive jurisdic-

tion to determine whether the strike was an activity protected by § 7 or prohibited by § 8 of the Taft-Hartley Act, and that until the Board determined that the conduct was neither protected nor prohibited, the state court could not entertain jurisdiction of the tort action." (See pages 9 and 10 of Brief for the Petitioner.)

The authority cited by petitioner, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.ed. (2d) 775, 79 S.Ct. 773 (1959) does not so hold. This Court said in that case (359 U.S. at page 244):

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield."

To the same effect is *Weber v. Anheuser-Busch*, 348 U.S. 468, 99 L.ed. 546, 75 S.Ct. 480 (1955), and cases cited.

The flaw in petitioner's argument is that petitioner does not, and cannot, show how its conduct can "fairly be assumed" to fall, or even remotely fall, under Sections 7 or 8 of the Taft-Hartley Act.

The stipulated facts are that the strike here in question was an effort to coerce an employer into rescinding the discharge of an incompetent employee whom the employer had discharged in good faith and with good cause. The union, having expressly agreed that the employer had the right to fire an incompetent worker, used its vast economic force in an effort to prevent the employer from exercising this right. Such conduct is coercive and tortious in the State of Washing-

ton, within the meaning of such cases as *Swenson v. Seattle Central Labor Council,* 27 Wn.(2d) 193, 177 P.(2d) 873 (1947) and *Safeway Stores v. Retail Clerks Union,* 184 Wash. 322, 51 P.(2d) 372 (1935). Moreover, by the view of most courts, including the Federal courts, such conduct constitutes a breach of a subsisting contract, at least if the contract contains (as here) a compulsory arbitration clause. *N.A.S.M. v. Stevedores & Longshoremen's Benevolent Soc.* (D.C. La. 1920) 265 Fed. 397; *N.L.R.B. v. Sunset Minerals, Inc.* (C.A. 9, 1954) 211 F.(2d) 224; *United Construction Workers v. Haislip Baking Co.* (C.A. 4, 1955) 223 F.(2d) 872, cert. den. 350 U.S. 847, 100 L.ed. 754, 76 S.Ct. 87; *Lewis v. Benedict Coal Corp.* (C.A. 6, 1958) 259 F.(2d) 346. The National Labor Relations Board agrees; see *W. L. Mead, Inc.,* 113 N.L.R.B. 1040, 36 L.R.R.M. 1392 (1955). See also Cox, Some Aspects of the Labor Management Act of 1947, 61 Harv. L. Rev. 274, 308 (1948). For collected cases see 2 A.L.R.(2d) 1278, 1281, and the A.L.R.(2d) Series Supplement, Vol. 1 at page 112.

The petitioner has agreed in its brief that "the protection which § 7 of the Act affords to strikers is withdrawn if the strike is in violation of an existing collective bargaining contract." See page 18 of Brief for the Petitioner. The Washington Supreme Court, applying the rule just referred to, found here that there was a violation of the contract. It follows as a matter of law that § 7 of the Taft-Hartley Act did not protect the activities which were dealt with below.

This view is buttressed by the additional fact that in any event the strike here was found not to be for mutual aid and protection but rather was called at the

personal whim of a business agent. See Finding of Fact VII (R. 188, 189):

> "The Court, notwithstanding said award (of arbitrators), and over objections of plaintiff's (respondent's) counsel, allowed the introduction of evidence bearing on the good faith of defendant (petitioner) in picketing plaintiff's place of business. The Court expressly finds, from all of said evidence, the picketing was the result of the decision of aforesaid Floyd Anderson (petitioner's business agent); that the defendant has not disputed nor did it dispute at the trial its responsibility for the acts and conduct of said Floyd Anderson; *that said Floyd Anderson was motivated by something other than the union's mutual aid and protection;* and that the defendant union has failed to produce evidence of sufficient weight to satisfy the burden of proof in support of its affirmative defense that the union acted justifiably under the the circumstances." (Emphasis and parentheses added)

As to whether petitioner's conduct was condemned by Section 8 of the Taft-Hartley Act, a careful examination of that section will fail to reveal any portion which even indirectly condemns petitioner's conduct in this case as an unfair labor practice. Certainly a breach of a labor agreement is not, *per se,* an unfair labor practice. *McCarroll v. Los Angeles County (etc.)* (Calif. 1957) 315 P.(2d) 322, cert. den. 355 U.S. 932, 2 L.ed.(2d) 415. As pointed out in *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 1 L.ed.(2d) 972, 77 S.Ct. 912 (1957), the N.L.R.B. is not the proper forum for disputes arising out of breaches of labor contracts, unless the breaches are also unfair labor practices as defined by Federal law.

This is not to say that by imaginative logic it might not be possible to find something about petitioner's conduct which was remotely covered under Sections 7 or 8 of the Taft-Hartley Act. However, a mere "argumentative coincidence in the facts" with a plausible N.L.R.B. action does not destroy state jurisdiction. *I.A.M. v. Gonzales,* 356 U.S. 617, 2 L.ed.(2d) 1018, 78 S.Ct. 923 (1958). In the *Garmon* case, on which petitioner primarily relies, the adjudication in the state court was not remotely but directly based "on the assumption that the behavior of the petitioning unions constituted an unfair labor practice" under Federal law. 359 U.S. 236 at page 245.

The balance of petitioner's argument on this issue assumes factual matters which do not accord with the record here. Thus in arguing that the strike here was "economic," the petitioner is asking the United States Supreme Court to assume a theory of the facts that by stipulation and arbitration was rejected below. Unless *all* cases involving labor in interstate commerce are to be held beyond the jurisdiction of state courts, a view never adopted by this Court or suggested by Congress, then the present matter falls as squarely as possible into an area still reserved to state action—i.e., coercive and tortious conduct in cynical breach of contract, under circumstances where neither Section 7 nor Section 8 of the Act applies.

The petitioner says that the *Board* should determine whether the contract was breached. This certainly is not a function vested in the Board by any part of Federal law, nor was it the intention of Congress.

"Once parties have made a collective bargaining

contract, the enforcement of that contract should be left to the usual processes of the law and not to to the NLRB." H. Conference Rep. No. 510, 80th Congress, 1st Session, page 42.

As the Board has itself said:

"The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms." *United Telephone Company*, 112 N.L.R.B. 779 (1955).

3. Breach of Contract

The burden of petitioner's argument is that § 301 of the Act deprived the state court, if not of jurisdiction (and petitioner apparently doesn't argue this), at least of any right to apply *state* law of contract to cases involving breaches of collective bargaining contracts. The only authority cited is *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 1 L.ed.(2d) 972, 77 S.Ct. 912 (1957), which however merely held that *Federal* substantive labor policy governs suits brought under § 301 in *Federal* courts. Nothing in § 301, however, purports to limit *state* courts enforcing contracts under *state* law. No decision of this Court so holds.

The argument is only academic, however, because in holding petitioner union's conduct to be in breach of contract, the Washington Supreme Court ruled squarely in accord with the rule of the *Federal* courts. Although the contract between the parties (Pl. Ex. 1, R. 202 *et seq.*) does not expressly prohibit strikes, yet—assuming the employer is not in breach itself, something not shown here—this is necessarily implied.

"As a general proposition, the right to strike and picket, though otherwise recognized, cannot be ex-

ercised during the life of a valid collective labor agreement which fails by its terms to preserve such rights."

2 A.L.R.(2d) 1278, 1281, citing many cases.
See also more recent cases cited in A.L.R.(2d) Series Supplement, Vol. 1, at page 112.

Obviously, this is the basic consideration to the employer of every labor contract. *N.A.S.M. v. Stevedores & Longshoremen's Benevolent Soc.* (D.C. La. 1920) 265 Fed. 397.

Even more clearly this is the rule where, as here, there is an arbitration clause, which would be meaningless if the labor union may without arbitration apply economic sanctions to obtain wages or conditions more favorable than provided by its contract before the latter's expiration. We again emphasize the fact that it is a *conclusive* fact, *stipulated* by the union herein, that the picketing in this case was to force the respondent company to re-employ a worker discharged as unsatisfactory although the worker was in fact unsatisfactory and discharged for that reason and in good faith (Pl. Ex. 12, pages 7 and 8, R. 211 *et seq.*).

"It is argued that a strike could not constitute a breach of a contract which did not contain a no strike clause; but we think it clear that the purpose of the contract was to require the settlement of disputes and grievances by a procedure which would not cause the disruption of business that would necessarily result from a strike and that a strike without following such procedure was necessarily a breach." (Cases cited) *United Construction Workers v. Haislip Baking Co.* (4th Cir. 1955) 223 F.(2d) 872, at 876, 877; cert. den. 350 U.S. 347.

In *Lewis v. Benedict Coal Corp.* (6th Cir., 1958) 259 F.(2d) 346, a contract contanied both a "no-strike" provision and an arbitration clause; the "no-strike" provision was abrogated by the parties; nonetheless a strike during the life of the contract was held to be a breach. See also *N.L.R.B. v. Sunset Minerals, Inc.* (9th Cir., 1954) 211 F.(2d) 224, and *W. L. Mead, Inc.*, 113 N.L.R.B. 1040 (1955), *supra*.

Petitioner evidently argues that this line of authority merely helds that a court should search the whole record to "determine whether the words implied an agreement not to strike." (See page 33 of Brief for the Petitioner). If so, there is certainly no showing that the Washington Court didn't do so. On the contrary that court held, what surely is manifest, that this strike

> " . . . was an attempt to force the respondent to forego the exercise of a right expressly provided by the agreement . . . "

and therefore a breach. (R. 195).

We suggest that petitioner's whole attempt to re-try in the United States Supreme Court an essentially factual issue—what constitute the implied obligations of a party to a contract—is addressed to the wrong tribunal. Petitioner raised all the same arguments to a board of arbitrators (including petitioner's own nominee, a Teamster official who failed to dissent from the decision of the arbitration board), to the trial court, and to a department of the state Supreme Court.

CONCLUSION

This proceeding should be dismissed in this Court for lack of jurisdiction, or in the alternative, the deci-

sion of the Supreme Court of Washington should be upheld.

Respectfully submitted,

STUART G. OLES
Counsel for Respondent
1308-20 Northern Life Tower
Seattle 1, Washington

Of Counsel:
EDWARD W. ALLEN
GERALD DEGARMO
GEORGE LEEDY
SETH W. MORRISON
1308-20 Northern Life Tower
Seattle 1, Washington

Office-Supreme Court, U.S.
FILED
SEP 21 [illegible]
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 50

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
An unincorporated association,
Petitioner,

vs.

LUCAS FLOUR COMPANY, a Washington corporation,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

PETITIONER'S REPLY BRIEF

Of Counsel:
MacDonald, Hoague & Bayless
320 Alaska Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Counsel for Petitioner

IN THE

Supreme Court of the United States

October Term, 1961

No. 50

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
An unincorporated association,
Petitioner,

vs.

LUCAS FLOUR COMPANY, a Washington corporation,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

PETITIONER'S REPLY BRIEF

Of Counsel:
MacDonald, Hoague & Bayless
320 Alaska Building
Seattle 4, Washington

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Counsel for Petitioner

SUBJECT INDEX

Jurisdiction 1

The judgment below is a final judgment of the highest court of the State of Washington..... 1

Mutual Aid and Protection..... 5

Appendices:

Appendix A The Constitution of the State of Washington.....App. p. 1

Appendix B Statutes of the State of Washington.....App. p. 1

Appendix C Rules Peculiar to the Business of the Supreme Court.....App. p. 4

Rules on Appeal .....App. p. 6

TABLE OF CASES

Arnold v. Nat'l Union of Marine Cooks and Stewards, cert. granted 347 US 916, 98 L ed 1071, 74 S Ct 516; judgment affirmed 348 US 37, 99 L ed 46, 75 S Ct 92; 44 Wn 2d 183, 256 P2d 1051..... 4

Gorman v. Washington University, 316 US 98, 86 L ed 1300 (1942)..... 5

Hoy v. Rhay, 361 US 959, 4 L ed 541, 80 S Ct 597 (1960); 54 Wn 2d 508, 342 P2d 607 (1959)..... 4

Market Street R. Co. v. Railroad Com. of Cal., 324 US 548, 551, 89 L ed 1171, 1177 (1945).....4-5

Puget Sound Power & Light Co. v. King County, 264 US 22, 68 L ed 541 (1924)..... 3

Ross v. Schneckloth, 357 US 575, 2 L ed 1547, 78 S Ct 1387 (1958), 51 Wn 2d 893, 318 P2d 975 (1957)..... 4

U.S.A. v. Carroll Construction Co., 346 US 802, 98 L ed 333, 74 S Ct 22; 41 Wn 2d 317, 249 P2d 234 (1952).. 4

IN THE

Supreme Court of the United States

October Term, 1961

No. 50

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
An unincorporated association,
Petitioner,

vs.

LUCAS FLOUR COMPANY, a Washington corporation,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

PETITIONER'S REPLY BRIEF

JURISDICTION

The judgment below is a final judgment of the highest court of the State of Washington.

The judgment appealed from (R. 200) is certified as a judgment of the Supreme Court of the State of Washington. Even though the argument was to Department One of that court and the Opinion (R. 192-200) was signed by five judges only, the judgment certified is that of the Washington Supreme Court, not that of a department of that court. This should be a complete answer of Respondent's challenge to the jurisdiction of this Court.

However, even if we assume that the judgment was issued only by Department One composed of the Chief

Justice and four other judges, it is still a final judgment of the highest court of the State of Washington. Article IV, §2 of the Washington Constitution (Appendix A) provides that "the Supreme Court shall consist of five judges" but that the legislature may increase the number of judges and "may provide for separate departments of said court." Pursuant to this provision the legislature increased the number of judges to nine and authorized the court to sit in two departments, named departments one and two (R.C.W. 2.04.120; Appendix B). The Chief Justice sits in both departments (Rule 6, Appendix C). Each department is empowered "to hear and determine causes and all questions arising therein, subject to the provisions in relation to the court en banc." (R.C.W. 2.04.120) The Chief Justice together with any two associated judges, or any four associate judges are given discretion to order a cause to be heard en banc after a departmental decision (R.C.W. 2.04.150). An en banc hearing is granted as a matter of the court's discretion when the issues are considered sufficiently important to warrant it. No party has a right to an en banc hearing any more than he has a right to a rehearing of the appeal before the rendering department.

R.C.W. 2.04.160 provides that if no petition for rehearing or for an en banc hearing is filed "the decision of a department shall become final thirty days from the date of its filing," unless during such thirty days an en banc hearing is ordered on the court's own initiative. The judgment of the department becomes, in the absence of a rehearing, a final judgment of the Supreme Court of the State of Washington.

It is not uncommon for a state supreme court to sit in two sections or divisions. e.g. Code of Alabama Recompiled 1958, Title 13 §11; Calif Const art 6 §2; Colo Const art 6 §5; Fla Const art 5, §4; La Const art 7 §5, Mo Const of 1945 art 5§7 (but en banc if federal question is involved or if there is a dissent); NC Const art 4, §6 (but must be en banc if the constitutional question is involved); Tex Const art 5 §2. This is not too different from the very common state provision that a majority of a state supreme court shall constitute a quorum.[1]

The United States Supreme Court had occasion to discuss the Washington Supreme Court's present department arrangement in *Puget Sound Power & Light Co. v. King County*, 264 US 22, 68 L ed 541 (1924). There it was said (pp. 24-25):

> "Under the law of Washington a decision of a department of the supreme court does not become final

[1] Ark Const Amend 9 §1
Ariz Const art 6 §2
Del Const of 1792 art 6 §3
Ga Const of 1877 art 6 §2
Idaho Const art 5 §6
Ind Const art 7 §2
Ill Const of 1879 art 6 §2
Iowa Const art 5 §2
La Const art 7 §4
Md Const art 4 §14
Mich Const of 1850 art 6 §2
Miss Const art 6 §145B
NJ Const art 6 §1
N Mex Const art 6 sec 89
NY Const art 6 §5
ND Const sec 89
Okla Const art 7 §3
Penn Stats Ann Title 17 §10
Utah Const art 8 sec 2
Wisc Const art 7 §4
Wisc Const art 5 §5

until thirty days after it is filed, during which a petition for rehearing may be filed. If no hearing is asked for, or no order entered for a rehearing en banc, in thirty days the decision becomes final."

While the jurisdictional question presented by Respondent does not appear to have been passed upon by this Court heretofore, this Court has on numerous occasions taken jurisdiction of a judgment upon a writ of certiorari to the Washington Supreme Court where the opinion of that court was, as here, rendered by the court sitting in department and no petition for rehearing had been filed. The most recent of such cases are: *Hoy v. Rhay*, cert. granted, case transferred to appellate docket, 361 US 959, 4 L ed 2d 541, 80 S Ct 597 (1960); 54 Wn 2d 508, 342 P2d 607 (1959); *Ross v. Schneckloth*, judgment vacated and case remanded for reconsideration, 357 US 575, 2 L ed 2d 1547, 78 S Ct 1387 (1958), 51 Wn 2d 893, 318 P2d 975 (1957); *Arnold v. Nat'l Union of Marine Cooks and Stewards*, cert. granted 347 US 916, 98 L ed 1071, 74 S Ct 516; judgment affirmed 348 US 37, 99 L ed 46, 75 S Ct. 92; 44 Wn 2d 183, 256 P2d 1051; *U.S.A. v. Carroll Construction Co.*, cert granted, judgment vacated and case remanded for consideration, 346 US 802, 98 L ed 333, 74 S Ct 22; 41 Wn 2d 317, 249 P2d 234 (1952).

The judgment below represents a full and effective determination of the litigation from which there was no appeal to another state court. All matters presented to the court were passed on by the five-judge court without dissent, and there was nothing new to be argued in a petition for rehearing that had not already been fully argued in the briefs. As this Court stated in *Market Street R. Co. v.*

Railroad Com. of Cal., 324 US 548, 551, 89 L ed 1171, 1177 (1945):

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen and revise its judgment . . . Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one."

The structure of the Supreme Court in the State of Washington is not to be confused with the entirely different procedure followed in the State of Missouri and described in the case of *Gorman v. Washington University*, 316 US 98, 86 L ed 1300 (1942), relied upon by Respondent. The Constitution of the State of Missouri provides that a litigant shall have an appeal from a divisional decision to an en banc court as a matter of right when a federal question is involved. Thus, under the Missouri Constitution, the division is not "the highest court of the state in which a decision could be had," inasmuch as a higher en banc hearing is provided as a matter of right for the purpose of passing on federal questions. *Gorman v. Washington University* is inapposite.

It is therefore submitted that this Court has jurisdiction of this action.

MUTUAL AID AND PROTECTION

We are compelled to correct a misconception created by Respondent's Brief (Resp. Br. 11). Respondent tries to indicate that the trial court found that the picketing was in some manner not for the mutual aid and protection of

the union and its members. In Finding of Fact V (R. 187), the Court expressly found:

> "The picketing was for the purpose of compelling the plaintiff to rehire one of its employees, Mr. Welsch, a union member."

As discussed in our opening brief (Pet'r Br. 16-17), it is well established that a strike to force reinstatement of a discharged employee is concerted activity for mutual aid and protection. It would seem to be Respondent's position that such a strike is not for mutual aid and protection. Respondent did not make this argument to the court below, and the court below did not base its decision on any such theory. A reading of that opinion shows clearly that the strike was to force Welsch's reinstatement and that was the totality of the facts in this respect (R. 195). This case presents no factual disputes, all such matters having been clearly determined—for the most part by stipulation.

Respectfully submitted,

FRANCIS HOAGUE
320 Alaska Building
Seattle 4, Washington
Counsel for Petitioner

Of Counsel
MACDONALD, HOAGUE & BAYLESS
320 Alaska Building
Seattle 4, Washington

APPENDIX A

Constitution of the State of Washington

ARTICLE IV—The Judiciary

§2 SUPREME COURT. The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum, and pronounce a decision. The said court shall always be open for the transaction of business except on non-judicial days. In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time and may provide for separate departments of said court.

APPENDIX B

Statutes of the State of Washington

Revised Code of Washington

R.C.W. 2.04.120 Two departments—Quorum

There shall be two departments of the superme court, denominated respectively department one and department two. The chief justice shall assign four of the associate judges to each department and such assignment may be changed by him from time to time; *Provided,* That the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the chief justice. The chief justice may sit in

either department and shall preside when so sitting, but the judges assigned to each department shall select one of their number as presiding judge. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions in relation to the court en banc. The presence of three judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of three judges shall be necessary to pronounce a decision in each department: *Provided*, That if three do not concur, the cause shall be reheard in the same department or transmitted to the other department, or to the court en banc.

R.C.W. 2.04.150 Apportionment of business – En banc hearings

The chief justice shall from time to time apportion the business to the departments, and may, in his discretion, before a decision is pronounced, order any cause pending before the court to be heard and determined by the court en banc. When a cause has been allotted to one of the departments and a decision pronounced therein, the chief justice, together with any two associate judges, may order such cause to be heard and decided by the court en banc. Any four judges may, either before or after decision by a department, order a cause to be heard en banc.

R.C.W. 2.04.160 Finality of departmental decision–Rehearings

The decision of a department, except in cases otherwise

ordered as hereinafter provided, shall not become final until thirty days after the filing thereof, during which period a petition for rehearing, or for a hearing en banc, may be filed, the filing of either of which, except as hereinafter otherwise provided, shall have the effect of suspending such decision until the same shall have been disposed of. If no such petition be filed the decision of a department shall become final thirty days from the date of its filing, unless during such thirty-day period an order for a hearing en banc shall have been made . . . The effect of granting a petition for a rehearing, or of ordering a cause once decided by department to be heard en banc, shall be to vacate and set aside the decision. Whenever a decision shall become final, as herein provided, a judgment shall issue thereon.

R.C.W. 2.04.170 En banc hearings—Quorum—Finality of decision

The chief justice, or any four judges, may convene the court en banc at any time, and the chief justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision in the court en banc: *Provided*, That if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court en banc shall be final except in cases in which no previous decision has been rendered in one of the departments, and in such cases the decision of the court en banc

shall become final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges . . .

APPENDIX C

Rules Peculiar to the Business of the Supreme Court

RULE 6 Two Departments—Assignment of Judges

The court is divided into two departments, denominated respectively, Department One and Department Two. The Chief Justice shall assign four of the associate judges to each department, and such assignment may be changed by him from time to time, provided that the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or, if no such agreement is made, as ordered by the Chief Justice.

The Chief Justice shall sit in both departments and shall preside when so sitting.

Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions in relation to the court *en banc*.

The presence of four judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of four judges shall be

necessary to pronounce a decision in each department.

RULE 7 Apportionment of Business—Order for hearings en banc

The Chief Justice shall from time to time apportion the business to the departments, and may, in his discretion, before a decision is filed in the office of the clerk, order any cause pending before the court to be heard and determined by the court *en banc*.

Any four judges, at any time before the filing of a decision in the office of the clerk by a department, may order a cause to be heard *en banc*.

RULE 15 Hearings en banc—Quorum—Finality of decision

The Chief Justice, or any four judges, may convene the court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision of the court *en banc*: *Provided*, That if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court whether rendered *en banc* or by a department shall be final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the

effect of suspending the decision until disposed of by the concurrence of five judges: *Provided*, That if for any cause five judges shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect any time after its filing and prior to such thirty-day period upon being in writing approved by six judges of such court. Whenever a decision shall become final as herein provided, a judgment shall issue thereon. *Provided*, That where a decision goes into effect in less than thirty days from the date of its filing, the judgment shall not be final as to the amount of the costs of the action taxed and allowed. The costs on appeal shall be computed and taxed as provided in Rules on Appeal 55. The costs as thus finally taxed will then be included in a supplemental judgment.

Rules on Appeal

RULE 50 Petitions for rehearing

Any party to an appealed case may, after an opinion has been filed, present to the court, in the manner and time as hereinafter provided, a petition for rehearing.

Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed. No more than one petition shall be filed by the same party. The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined.

When a rehearing is granted, the clerk shall notify counsel for the respective parties thereof.

When an answer to a petition for rehearing is called for by the court, the clerk shall mail to the attorney of the party from whom the answer is required a copy of the original petition, with a request that he file an answer thereto within fifteen days and serve a copy thereof on opposing counsel.

Three copies each of the petition for rehearing and of the answer thereto, if called for, shall be filed with the clerk.

Petitions for rehearing and answers thereto may be printed, mimeographed, or typewritten. If a petition for rehearing be granted, the court may require additional copies of the petition, answer and briefs to be supplied in the manner indicated by the court.